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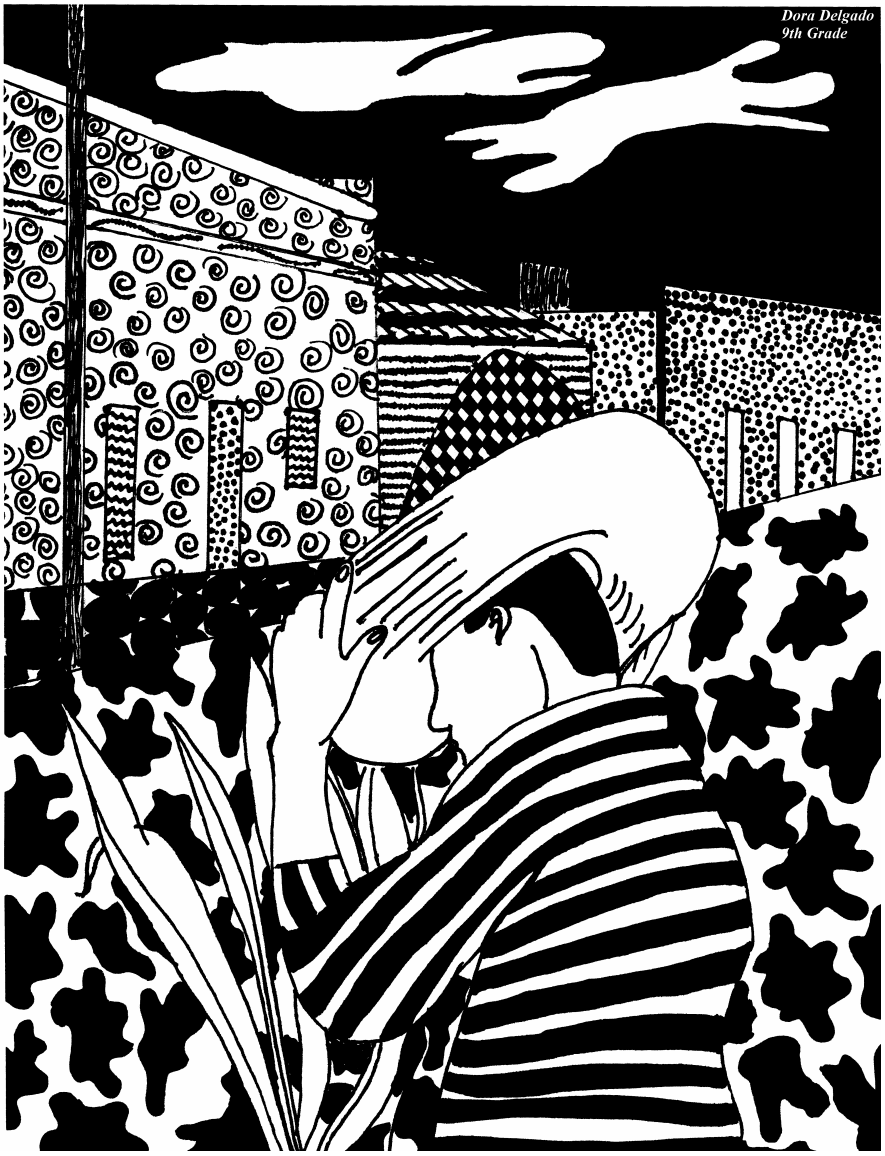

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: Subadmin@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Opinions

Opinion No. GA-0397

The Honorable Mike Jackson

Chair, Committee on Nominations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Education Code section 54.208's exemption from tuition for students enrolled in fire science courses (RQ-0371-GA)

S U M M A R Y

In Education Code section 54.208, "fire science" is a technical term that refers to a course that falls within a designated fire science curriculum, as well as a course that is primarily related to fire service, emergency medicine, emergency management, or public administration, regardless of whether that course falls within a curriculum designated as "fire science."

A fire fighter seeking an exemption from tuition under section 54.208 need not be pursuing a degree in fire science and may already have a degree in fire science.

Section 54.208 exempts a fire fighter from paying tuition and laboratory fees at public junior colleges and four-year colleges and universities.

Education Code section 54.051 permits a public junior college to determine its tuition, subject to statutorily prescribed minimums. In addition, Education Code section 130.084 authorizes a public junior college's governing board to set and collect with respect to a public junior college in the district any amount of tuition or fees the board considers necessary for the efficient operation of the college. Therefore, where a public junior college has designated a charge as "tuition," that charge is tuition; where a public junior college has designated a charge as a "fee," it is a fee. And thus to the extent Houston Community College has designated a charge as a fee, that fee would not be tuition, and a fire fighter exempt from paying tuition under Education Code section 54.208 would have to pay that non-tuition fee.

Opinion No. GA-0398

Mr. Carl Reynolds

Administrative Director

Office of Court Administration

Post Office Box 12066

Austin, Texas 78711-2066

Re: Eligibility of former and retired judges to sit by assignment (RQ-0377-GA)

S U M M A R Y

Government Code section 74.055(c) sets out eligibility requirements applicable to former and retired judges who wish to sit by assignment as a judge. Amendments to section 74.055 that became effective on June 18, 2003 increased the required length of service needed to qualify and adopted stricter requirements as to disciplinary actions. The amending legislation excepted from the changes to section 74.055 those persons who qualified to serve by assignment under its requirements immediately before the changes became effective. The exception applies both to persons who at the relevant time were on the list to serve by assignment and those who were not on the list but qualified to be placed on it. The exception does not apply to a person who was an active judge when the changes to section 74.055 became effective.

Opinion No. GA-0399

Eduardo J. Sanchez, M.D., M.P.H.

Commissioner

Texas Department of State Health Services

1100 West 49th Street

Austin, Texas 78756

Re: Whether section 241.154(b) of the Health and Safety Code or section 408.025(d) of the Labor Code governs the fees a hospital may charge a workers' compensation carrier to provide certain records in a workers' compensation proceeding (RQ-0382-GA)

S U M M A R Y

Section 408.025(d) of the Texas Labor Code governs fees for the release of reports and records a health care provider is required to prepare and submit under chapter 408 or Texas Department of Insurance, Division of Workers' Compensation rules. A hospital licensed under chapter 241 of the Texas Health and Safety Code that is requested by a workers' compensation carrier to provide such reports and records must charge fees authorized by the fee schedule promulgated under section 408.025(d) of the Labor Code. A hospital that is requested by

a workers' compensation carrier to provide other medical records in a workers' compensation proceeding may charge fees under section 241.154(b) of the Health and Safety Code.

Opinion No. GA-0400

The Honorable David Aken

San Patricio County Attorney

San Patricio County Courthouse, Room 102

Sinton, Texas 78387

Re Whether an individual or company may set up a plat copying machine in a county clerk's office or in another area of the county courthouse (RQ-0379-GA)

S U M M A R Y

A county clerk who wishes to regulate the copying of real property plats should first promulgate reasonable rules that address such matters as available space, safety, and disruption. Whether any particular rule is valid is a question of fact to be determined by a court. Moreover, this result is limited to the office of the San Patricio County Clerk.

Opinion No. GA-0401

Mr. Paul Mallett, Executive Director

Commission on State Emergency Communications

333 Guadalupe Street, Suite 2-212

Austin, Texas 78701-3942

Re: Whether the Commission on State Emergency Communications or the Comptroller of Public Accounts has primary jurisdiction to determine in the context of a claim for a refund whether the 9-1-1 emergency service fee imposed on wireless telecommunications connections by Texas Health and Safety Code section 771.0711(a) is applicable to a service provider's specific service (RQ-0370-GA)

S U M M A R Y

The Commission on State Emergency Communications, not the Comptroller of Public Accounts, has authority to determine whether section 771.0711(a) of the Texas Health and Safety Code, imposing a 9-1-1 emergency service fee on wireless telecommunications connections, applies to a wireless service provider's specific service. The Comptroller, not the Commission, has authority to order a refund of fees collected under section 771.0711. A claim for a refund of the fee imposed under that section must be filed with the Comptroller, but if the claim presents issues particularly within the Commission's expertise, the Comptroller should abate the administrative proceeding to allow the Commission to make the initial determination of those issues.

Opinion No. GA-0402

The Honorable Richard E. Glaser

County and District Attorney, Fannin County

101 East Sam Rayburn Drive, Suite 301

Bonham, Texas 75418

Re: Whether an elected constable is prohibited from simultaneously serving as a full-time deputy sheriff (RQ 0383-GA)

S U M M A R Y

An elected constable is not prohibited by article XVI, section 40 of the Texas Constitution or the common-law doctrine of incompatibility from simultaneously serving as a deputy sheriff.

Opinion No. GA-0403

Mr. James R. Hine

Commissioner

Texas Department of Aging and Disability Services

Post Office Box 149030

Austin, Texas 78714-9030

Re: Whether an establishment that furnishes food and shelter to four or more persons who are unrelated to the proprietor and that requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under section 247.021(a) of the Health and Safety Code (RQ-0381-GA)

S U M M A R Y

An establishment, including one characterized as a retirement community, that furnishes food and shelter to four or more persons who are unrelated to the proprietor and that requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under section 247.021(a) of the Health and Safety Code. An assisted living facility may not require its residents to use a particular personal care services provider to the extent the services are provided by a health care professional, as defined by section 247.067(a) of the Health and Safety Code. Nor may an assisted living facility restrict its residents' rights to contract for health care services with personal care services providers, although a facility may restrict residents' authority to contract with personal care services providers for services other than health care. To the extent an assisted living facility's contract with its residents requires the residents to obtain non-health care personal care services from a specified provider, the facility may enforce the contract.

Opinion No. GA-0404

Mr. Carl Reynolds

Administrative Director

Office of Court Administration

Post Office Box 12066

Austin, Texas 78711-2066

Re: Whether the seal placed on certified copies of documents recorded in the county clerk's office must be raised (RQ-0384-GA)

S U M M A R Y

Texas statutes do not mandate that the seal placed on every page of a document as part of the clerk's certificate be raised. As an elected officer the county clerk has discretion to determine whether the seal placed on every page of the document must be raised. A document that bears a clerk's certificate is a certified document.

Opinion No. GA-0405

The Honorable Steven B. Payson

Dawson County Attorney

Post Office Box 1268

Lamesa, Texas 79331

Re: Whether article VII, section 6b of the Texas Constitution permits a commissioners court to distribute county permanent school fund reductions to a school district based on students attending school in the district who have transferred from another school district in the county (RQ-0386-GA)

S U M M A R Y

Article VII, section 6b of the Texas Constitution authorizes a commissioners court to reduce the county permanent school fund and to "distribute the amount of the reduction to the independent and common school districts of the county on a per scholastic basis." Tex. Const. art. VII, §6b. For purposes of article VII, section 6b, transfer students are to be counted as scholastics of the school district in which they reside. A commissioners court may select a method to determine the number of resident scholastics in each school district in the county, but it may not select a method that counts as a scholastic a person who resides in another school district.

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-200601093
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: February 28, 2006

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER D. DISPUTE AND AUDIT OF BILLS BY INSURANCE CARRIERS

28 TAC §§133.301, 133.302, 133.304

The Texas Department of Insurance, Division of Workers' Compensation is renewing the effectiveness of the emergency adoption of amended §§133.301, 133.302, and 133.304, for a 60-day period. The text of the amended sections were originally published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7621).

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600905
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Original Effective Date: November 3, 2005
Expiration Date: May 1, 2006
For further information, please call: (512) 804-4288

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER G. PROSPECTIVE AND CONCURRENT REVIEW OF HEALTH CARE

28 TAC §134.600

The Texas Department of Insurance, Division of Workers' Compensation is renewing the effectiveness of the emergency adoption of amended §134.600, for a 60-day period. The text of the amended section was originally published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7624).

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600906
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Original Effective Date: November 3, 2005
Expiration Date: May 1, 2006
For further information, please call: (512) 804-4288

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SUBCHAPTER I. PROVIDER BILLING PROCEDURES

28 TAC §134.801

The Texas Department of Insurance, Division of Workers' Compensation is renewing the effectiveness of the emergency adoption of amended §134.801, for a 60-day period. The text of the amended section was originally published in the November 18, 2005, issue of the *Texas Register* (30 TexReg 7626).

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600907
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Original Effective Date: November 3, 2005
Expiration Date: May 1, 2006
For further information, please call: (512) 804-4288

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

SUBCHAPTER D. FORMS FOR CHILD SUPPORT ENFORCEMENT

1 TAC §55.120

The Office of the Attorney General, Child Support Division proposes the amendment of §55.120(a) to replace the current form National Medical Support Notice, as authorized by Texas Family Code §154.186(c), which authorizes the State's Title IV-D agency to prescribe forms for the efficient use of the Notice. The proposed amendment is necessary to reflect revisions made to the form.

The National Medical Support Notice was revised to conform to the National Medical Support Notice issued by the federal Office of Child Support Enforcement.

Alicia Key, IV-D Director, Child Support Division, has determined that for the first five years the amended section as proposed is in effect, there will be no significant fiscal implications for state or local government.

Ms. Key has also determined that for each year of the first five years the amended section as proposed is in effect, the public benefit as a result of the amended section will be compliance with federal requirements.

Ms. Key has also determined that for the first five years the amended section as proposed is in effect, there will be no significant fiscal implications for small businesses or individuals.

Ms. Key has also determined that there will be no local employment impact as a result of the amended section as proposed.

Comments on this proposed amendment should be submitted to Kathy Shafer, State and Federal Operations Section, Child Support Division, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741 or (mailing address) P.O. Box 12017, Mail Code 044, Austin, Texas 78711-2017.

The proposed amendment to §55.120(a) is authorized by Texas Family Code §154.186(c).

The proposed amendment affects Texas Family Code §154.186 and §154.187.

§55.120. National Medical Support Notice, Request for Review of National Medical Support Notice, Termination of National Medical Support Notice.

(a) The National Medical Support Notice is federally mandated for use in IV-D cases and may be used in any other suit in which an obligor is ordered to provide health insurance coverage for a child. [~~It may also be used in any other Suit Affecting the Parent Child Relationship order to enforce medical child support.~~]

Figure: 1 TAC §55.120(a)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600881
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: April 9, 2006
For information regarding this publication, you may contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

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PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 113. PROCUREMENT DIVISION

SUBCHAPTER H. STATE AGENCY PROCUREMENTS OF RECYCLED, REMANUFACTURED OR ENVIRONMENTALLY SENSITIVE COMMODITIES OR SERVICES

1 TAC §113.135

The Texas Building and Procurement Commission (TBPC) proposes new Title 1, Texas Administrative Code, Chapter 113, Subchapter H, §113.135 (relating to State Agency Procurements of Recycled, Remanufactured or Environmentally Sensitive Commodities or Services). This new rule is being proposed to reorganize existing §113.136 and §113.137 into one section. The new rule also incorporates legislative changes pursuant to House Bill 2466, 79th Legislature. Existing §113.136 and §113.137 are being proposed for repeal simultaneously and published elsewhere in this edition of the *Texas Register*.

Ms. Joanna B. Peavy, Deputy Executive Director, has determined for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments.

Ms. Peavy has further determined that for each year of the first five-year the rule is in effect, the public benefit anticipated as a result of this adoption and related repeals of §113.136 and §113.137 will be more efficient and well-organized rules.

There will not be any effect on large, small or micro-businesses that routinely participate in state business opportunities because these rules apply only to governmental entities. There will be no anticipated economic costs to persons who are required to comply with the rules and there is no impact on local employment.

Comments on the proposals may be submitted to Rules Coordinator, Legal Services Division, Texas Building and Procurement Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments may also be sent via email to: rulescomments@tbpc.state.tx.us. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The amendments are proposed under the authority of the Tex. Gov't Code Ann. §2155.445 and §2155.448 authorizing the Texas Building and Procurement Commission to adopt rules relating to the recycling market development implementation.

The following code sections are affected by these rules: Tex. Gov't Code Ann. §2155.445 and §2155.448.

§113.135. State Agency Procurements of Recycled, Remanufactured or Environmentally Sensitive Commodities or Services.

(a) The Texas Building and Procurement Commission (TBPC) may designate as "First Choice" certain recycled, remanufactured or environmentally sensitive commodities or services.

(b) First Choice items are designated recycled, remanufactured, and environmentally sensitive commodities or services that state agencies shall give a preference for when purchasing. These items include, but are not limited to:

(1) re-refined oils and lubricants;

(2) recycled content toilet paper;

(3) toilet seat covers and paper towels;

(4) recycled content printing, computer and copier paper, and business envelopes;

(5) recycled content plastic trash bags;

(6) recycled content plastic covered binders;

(7) recycled content recycling containers; and

(8) Energy Star labeled photocopiers.

(c) Commodities or services that are designated as First Choice items will be reflected in the State Procurement Manual. The State Procurement Manual will be revised as new commodities or services are designated as First Choice items.

(d) State agency purchases of commodities or services that do not accomplish the same purpose as a commodity or service as the First Choice items identified in the State Procurement Manual should be documented in the procurement file as required by Texas Government Code §2155.448(b).

(e) Reports. In accordance with Texas Government Code §2155.448(c), not later than January 1 of each year, each state agency, excluding institutions of higher education, must deliver a report of total expenditures for purchases of goods and services that have recycled material content that are remanufactured or environmentally sensitive. These reports shall be made to the TBPC at https://portal.tbpc.state.tx.us/. TXMAS recycled, remanufactured or environmentally sensitive contract purchases may be added to this report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601042
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-7829

SUBCHAPTER H. RECYCLING MARKET DEVELOPMENT BOARD (RMDB)

1 TAC §113.136, §113.137

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Building and Procurement Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Building and Procurement Commission (TBPC) proposes the repeal of Title 1, Texas Administrative Code, Chapter 113, Subchapter H, §113.136 and §113.137 (relating to Recycling Market Development Board). These sections are being proposed for repeal because a new §113.135 is being proposed for adoption simultaneously and published elsewhere in this edition of the *Texas Register.*

Ms. Joanna B. Peavy, Deputy Executive Director, has determined for the first five-year period the repeal is in effect there will be no fiscal implications for state or local governments.

Ms. Peavy has further determined that for each year of the first five-year the repeal is in effect, the public benefit anticipated as a result of the repeal and the related adoption of new §113.135 will be more efficient and well-organized rules.

There will not be any effect on large, small or micro-businesses that routinely participate in state business opportunities because these rules apply only to governmental entities. There will be no anticipated economic costs to persons who are required to comply with the rules and there is no impact on local employment.

Comments on the proposals may be submitted to Rules Coordinator, Legal Services Division, Texas Building and Procurement Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments may also be sent via email to: rulescomments@tbpc.state.tx.us. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*. Questions concerning this proposed repeal can be directed to Ms. Connie K. Sanders at (512) 463-7829.

The repeal of the existing rules is proposed under Tex. Gov't Code Ann. §2152.003 and §2155.448, which authorizes the Texas Building and Procurement Commission to adopt identifying recycled, remanufactured or environmentally sensitive commodities or services and designating purchasing goals for such commodities and services.

The following code section is affected by these rules: Tex. Gov't Code Ann. §2155.445 and §2155.448.

§113.136. Definitions.

§113.137. Identifying Recycled, Remanufactured or Environmentally Sensitive Commodities or Services for Procurements by State Agencies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601041
Ingrid K. Hansen
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-7829

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §1.209

The Texas Department of Agriculture (the department) proposes new Chapter 1, Subchapter E, §1.209, concerning the Wine Industry Development Advisory Committee. New §1.209 adds the Wine Industry Development Advisory Committee to the list of the department's advisory committees.

Brian Murray, Special Assistant for Producer Relations, has determined that for the first five years the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Murray also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be to provide interested members of the public with accurate information regarding the department's advisory committees. For the first five-year period the new section is in effect, there will be no economic cost for micro-businesses, small businesses or individuals who are required to comply with the section, as proposed.

Comments on the proposal may be submitted to Brian Murray, Special Assistant for Producer Relations, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78749. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

New §1.209 is proposed under the Texas Government Code, §2110.005, which requires that an agency that establishes an advisory committee adopt rules to state the purpose and tasks of the committee and manner in which the committee shall report to the agency; §2110.008, which authorizes an agency establishing an advisory committee to designate the duration of a committee; and the Texas Agriculture Code, §50B.002 which authorizes the Commissioner of Agriculture to appoint a Wine Industry Development Advisory Committee.

The codes affected by the proposal are the Texas Government Code, Chapter 2110 and the Texas Agriculture Code, Chapter 50B.

§1.209. Wine Industry Development Advisory Committee.

(a) Purpose. The Wine Industry Development Advisory Committee (Committee) is appointed by the Commissioner of Agriculture (Commissioner) pursuant to the Texas Agriculture Code, §50B.002 and is established within the Texas Department of Agriculture (the department) to assist the Commissioner in developing a long- term vision and marketable identity for the wine industry in the state.

(b) Composition; Duties. The Committee is composed of representatives of the Texas wine industry including winery owners, wine grape growers, persons representing consumers of wine, ex-officio members representing institutions of higher education that have established programs in enology and viticulture, and the department. The Committee shall assist the Commissioner in developing a vision and identity for the Texas wine industry by studying future industry development, funding, research, educational programming, risk management and marketing issues related to wine. In addition, the Committee may advise the Commissioner on the implementation of the Wine Industry Development Fund grant program.

(c) Duration. The Committee shall remain in existence as long as deemed necessary by the Commissioner.

(d) Reporting. Reporting takes place through meetings held by the Committee. Through these meetings, the Commissioner and/or department staff discuss matters related to the committee's business and the Committee provides oral feedback and direction. The Committee is staffed by the department. Department staff prepares and maintains the minutes of each advisory committee meeting. Staff maintains a record of actions taken and distributes copies of approved minutes and other Committee documents to Committee members and the Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200601016
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-4075

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CHAPTER 21. CITRUS

SUBCHAPTER A. CITRUS QUARANTINES

4 TAC §21.5, §21.6

The Texas Department of Agriculture (the department) proposes amendments to §21.5 and §21.6, concerning citrus quarantines, to clarify requirements related to citrus quarantines and citrus

budwood, and to provide procedures whereby properly tested budwood from any state may be imported into Texas.

The proposed amendment to §21.5 clarifies what plant species are considered quarantined articles. Amendments to §21.6 are proposed to increase clarity and to provide procedures for the importation of properly tested budwood from any state into Texas. Currently such procedures are available only for budwood from California or Florida. These amendments will provide the citrus industry and other citrus growers in Texas a means for obtaining access to a larger citrus budwood selection that is free from pests and diseases.

Dr. Robert L. Crocker, coordinator for integrated pest management, vitrus and biotechnology programs, has determined that for the first five-year period the proposed amendments are in effect, there is no anticipated fiscal impact on state or local governments as a result of administration and enforcement of the sections, as proposed.

Dr. Crocker has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of administering and enforcing the amended sections is an adequate supply of pest free citrus budwood for the production of citrus plants. There will be no anticipated cost to growers and retailers required to comply with the proposal.

Comments on the proposal may be submitted to Dr. Robert L. Crocker, Coordinator for Integrated Pest Management, Citrus and Biotechnology Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of the publication of the proposal in the *Texas Register*.

The amendments to §21.5 and §21.6 are proposed under the Texas Agriculture Code (the Code), §71.009, which provides the department with the authority to adopt rules as necessary for the seizure, treatment, and destruction of plants, plant products, and other substances for the effective enforcement and administration of Chapter 71; and the Code, §73.002 which provides for the state to use all constitutional measures to protect the citrus industry from destruction by pests and diseases.

The code that is affected by the proposal is Texas Agriculture Code, Chapters 71 and 73.

§21.5. Quarantined Articles.

Quarantined articles include the quarantined pests; any part of any citrus tree, including budwood, seed, or seedlings; any [~~ornamental~~] plants [~~closely related to citrus~~] in the botanical family Rutaceae, subfamily Aurantioideae (including the genera Aegle, Aeglopsis, Afraegle, Atalantia, Balsamocitrus, Burkillanthus, Citropsis, Citrus, Clausena, Clymenia, Eremocitrus, Feronia, Feroniella, Fortunella, Glycosmis, Hesperethusa, Limnocitrus, Luvunga, Merope, Merrillia, Microcitrus, Micromelum, Monanthocitrus, Murraya, Oxanthera, Pamburus, Paramignya, Pleiospermium, Poncirus, Severinia, Swinglea, Triphasia and Wenzelia); and any article carrying or capable of carrying the plant pests or diseases.

§21.6. Restrictions.

(a) - (b) (No change.)

(c) Exceptions.

(1) (No change.)

(2) Budwood of citrus varieties not existing in Texas may be shipped to Texas from any state [~~Florida, California,~~] or from outside the United States under the following conditions:

(A) before any citrus budwood is allowed to enter Texas, it shall be certified as originating from an area free of citrus blight. It shall also have been tested using methods approved by the department, and such tests shall have produced negative results for citrus tristeza virus, psorosis, viral leprosis, citrus variegated chlorosis, greening, citrus canker, citrus scab and stubborn disease of citrus. Documentation of negative results of tests described in this section shall be included with the shipment; and

(B) budwood shall be assigned to a federal or state agency approved by the department for the purpose of confirmation tests to determine if the budwood is free from all virus and infectious diseases currently known at the time of the confirmation tests before it is released to the buyer. For confirmation tests, budwood shall be grown on rootstock varieties appropriate for the diagnosis of the diseases listed in this section; and

(C) for all budwood shipments, a permit from the Texas Department of Agriculture shall be issued and, together with a copy of the certificate(s) required by subparagraphs (D) and (E) of this section, shall be attached to the shipment; and

(D) before any citrus budwood will be allowed to enter Texas from outside the continental United States, it shall be cleared through the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine. Such clearance shall be certified to and approved by the department before the entrance of the budwood shipment into Texas; or

(E) in addition to the requirements outlined in subparagraphs (A), (B), and (C) of this paragraph, shipments originating in a state other than Texas [~~Florida or California~~] shall be accompanied by [~~include~~] a certificate from the origin state's department of agriculture specifying that the budwood is free of pests and diseases listed in this subchapter. A copy of the certificate shall be sent to and approved by the Texas Department of Agriculture before shipment of the budwood to Texas. However, budwood originating from the California citrus clonal protection program (CCCPP) or the USDA-ARS National Clonal Germplasm Repository for Citrus and Dates (USDA-ARS-NCGR) will be exempt from the requirements in subparagraphs (A) and (B) of this paragraph, but must be accompanied by [~~will require~~] a certificate from the CCCPP or the USDA-ARS-NCGR specifying that the budwood is free of pests and diseases listed in this subchapter instead of the origin state's certificate.

(3) - (4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601021
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 4. CURRENCY EXCHANGE

7 TAC §§4.7, 4.9, 4.12, 4.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Finance Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), proposes the repeal of §4.7, concerning bond requirements and deposits in lieu of bond, §4.9, concerning misrepresentation of correction and enforcement actions for continuing and repeat violations, §4.12, concerning currency exchange license applications, notices to applicants, application processing times, abandoned filings, and appeals, and §4.21, concerning information to consumers on how to file a complaint.

Prior to September 1, 2005, Texas law regulated money services businesses under two separate chapters of the Finance Code. Chapter 152, the Texas Sale of Checks Act, regulated businesses that issue and sell checks, money orders, stored value cards, and other payment instruments used to transfer money from one person to another. Finance Code, Chapter 153, regulated businesses that conduct currency exchange, transmission and transportation transactions.

During the 79th Regular Session, the Texas Legislature enacted the Money Services Act (Act of May 26, 2005, 79th Leg., R.S., H.B. 2218, §1), effective September 1, 2005. The Money Services Act (MSA), codified as Finance Code, Title 3, Subtitle E, Chapter 151, consolidates the regulation of persons engaged in the money transmission and currency exchange business in Texas into one act. The MSA repeals Finance Code, Chapters 152 and 153, also effective September 1, 2005.

Chapter 4 consists of the administrative rules the commission adopted to implement now-repealed Finance Code, Chapter 153. In response to the enactment of the MSA, the commission has undertaken a rulemaking project to enact new regulations under the MSA and has recently adopted two new sections, one a transition section and the other an agent exclusion section. The new MSA sections are located in Chapter 33 of this title (Money Services Businesses). As new Chapter 33 sections are proposed and adopted, the commission will propose and adopt the repeal of existing sections of Chapter 4 as appropriate. Ultimately, all sections of existing Chapter 4 will be repealed.

The sections of Chapter 4 that the commission at this time proposes for repeal fall into two general categories. The first category includes §4.12 and §4.21, sections whose substance has been incorporated into new sections of Chapter 33 of this title (Money Services Businesses) that the commission is simultaneously proposing in this issue of the *Texas Register*. Specifically, the substance of §4.12, which pertains to new license applications, the remedy available to an applicant if the department fails to comply with certain application processing times, abandoned applications, and appeals of license denials, will be included in proposed new §33.13 and 33.15. Similarly, the substance of §4.21, which specifies how a license holder must tell its customers how to file complaints, will be included in proposed new §33.51.

The second category of sections that are proposed for repeal consists of §4.7 and §4.9. These sections are obsolete because their substance has been moved into or is rendered unnecessary by the MSA. Section 4.7, which establishes the requirements related to the bond or other security a currency exchange, transmission or transportation business licensed under Finance Code, Chapter 153, must satisfy, is unnecessary. All money transmission is now regulated under the MSA, and the security requirements for money transmitters and currency exchangers are set out in Finance Code, §151.308 and §151.506, respectively. Section 4.9, concerning the correction of violations and imposition of administrative penalties for continuing and repeat violations, is rendered unnecessary by Finance Code, §151.707. Section 151.707 authorizes the banking commissioner to impose an administrative penalty upon a person who violates the MSA or a rule adopted or order issued under the statute and fails to correct with violation within 30 days after the department sends notice of the violation, or who engages in a pattern of violations or demonstrates a willful disregard for the requirements of the law.

Ms. Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that for the first five year period the repeal is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal of this section.

Ms. Newberg has also determined that, for each of the first five years the repeal as proposed will be in effect, the anticipated public benefit will be deletion of regulations that are unnecessary or obsolete. The repealed sections will be replaced, as necessary, with new, updated regulations that conform to current law. No economic costs will be incurred by a person required to comply with the repeal of this section. There will be no adverse economic effect on small businesses.

To be considered, comments on the proposed repeal must be submitted not later than 30 days after the date of publication of this notice. Comments should be addressed to Sarah Shirley, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: sarah.shirley@banking.state.tx.us.

The repeal is proposed under Finance Code, §151.102, which authorizes the commission to adopt rules to administer and enforce Finance Code, Chapter 151.

Finance Code, Chapter 151, is affected by the proposed repeal.

§4.7. Bond Requirements; Deposits in Lieu of Bond.

§4.9. Misrepresentation of Correction; Enforcement Actions for Continuing and Repeat Violations.

§4.12. Currency Exchange License Applications; Notices to Applicants; Application Processing Times; Abandoned Filings; Appeals.

§4.21. How Do I Provide Information to Consumers on How to File a Complaint?

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600875

Everette D. Jobe
Certifying Official
Finance Commission of Texas
Proposed date of adoption: April 28, 2006
For further information, please call: (512) 475-1300

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PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 29. SALE OF CHECKS ACT

7 TAC §§29.3, 29.4, 29.6 - 29.10, 29.12

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), proposes the repeal of §29.3, concerning application for new sale of check license, §29.4, concerning violation of application processing times, §29.6, concerning net worth and bonding requirements for a license holder that conducts currency exchange, transportation or transmission transactions, §29.7, concerning exemption from licensing, §29.8, concerning license renewal, §29.9, concerning extension of time to file annual financial statement, §29.10, concerning correction of violations and imposition of administrative remedy, and §29.12, concerning notice to customers regarding complaints.

Prior to September 1, 2005, Texas law regulated money services businesses under two separate chapters of the Finance Code. Chapter 152, the Texas Sale of Checks Act, regulated businesses that issue and sell checks, money orders, stored value cards, and other payment instruments used to transfer money from one person to another. Finance Code, Chapter 153, regulated businesses that conduct currency exchange, transmission and transportation transactions.

During the 79th Regular Session, the Texas Legislature enacted the Money Services Act (Act of May 26, 2005, 79th Leg., R.S., H.B. 2218, §1), effective September 1, 2005. The Money Services Act (MSA), codified as Finance Code, Title 3, Subtitle E, Chapter 151, consolidates the regulation of persons engaged in the money transmission and currency exchange business in Texas into one act. The MSA repeals Finance Code, Chapters 152 and 153, also effective September 1, 2005.

Chapter 29 consists of the administrative rules the commission adopted to implement now-repealed Finance Code, Chapter 152. In response to the enactment of the MSA, the commission has undertaken a rulemaking project to enact new regulations under the MSA and has recently adopted two new sections, one a transition second and the other an agent exclusion section. The new MSA sections are located in Chapter 33 of this title (Money Services Businesses). As new Chapter 33 sections are proposed and adopted, the commission will propose and adopt the repeal of existing sections of Chapter 29 as appropriate. Ultimately, all sections of existing Chapter 29 will be repealed.

The sections of Chapter 29 that the commission at this time proposes for repeal fall into two general categories. The first category includes §§29.3, 29.4, 29.8, 29.9 and 29.12. The substance of these sections has been incorporated into new sections of Chapter 33 of this title (Money Services Businesses), which the commission is simultaneously proposing in this issue of the *Texas Register*. Specifically, the substance of §29.3 and §29.4, which pertain respectively to new license applications and the remedy available to an applicant if the department fails to comply with certain application processing times, will be included in proposed new §33.13 and §33.15. Sections 29.8 and 29.9 concern license renewals and extensions of time for filing annual statements. The substance of these sections will be included in proposed new §33.21 (and is also addressed in Finance Code, 151.207). Similarly, the substance of §29.12, which specifies how license holders must tell their customers how to file complaints, will be included in proposed new §33.51.

The second category of sections proposed for repeal consists of §§29.6, 29.7, and 29.10. These sections are obsolete because their substance has been moved into or is rendered unnecessary by the MSA. Section 29.6, which establishes the net worth and bond requirements for a Finance Code, Chapter 152, sale of checks license holder that conducts currency-based transactions generally regulated under Finance Code, Chapter 153, is unnecessary. All money transmission is now regulated under the MSA, and the security requirements for both money transmitters and currency exchangers are set out in Finance Code, §151.308 and §151.506, respectively. The exemptions from licensing recognized in §29.7 are now set out in Finance Code, §151.103, and §33.3 of this title (relating to Agent Exclusion). Finally, §29.10, concerning the correction of violations and imposition of administrative penalties, is rendered unnecessary by Finance Code, §151.707. Section 151.707 authorizes the banking commissioner to impose an administrative penalty upon a person who violates the MSA or a rule adopted or order issued under the statute and fails to correct with violation within 30 days after the department sends notice of the violation, or who engages in a pattern of violations or demonstrates a willful disregard for the requirements of the law.

Ms. Stephanie Newberg, Deputy Commissioner, Texas Department of Banking, has determined that for the first five year period the repeal is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal of this section.

Ms. Newberg has also determined that, for each of the first five years the repeal as proposed will be in effect, the anticipated public benefit will be deletion of regulations that are unnecessary or obsolete. The repealed sections will be replaced, as necessary, with new, updated regulations that conform to current law. No economic costs will be incurred by a person required to comply with the repeal of this section. There will be no adverse economic effect on small businesses.

To be considered, comments on the proposed repeal must be submitted not later than 30 days after the date of publication of this notice. Comments should be addressed to Sarah Shirley, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by e-mail to: sarah.shirley@banking.state.tx.us.

The repeal is proposed under Finance Code, §151.102, which authorizes the commission to adopt rules to administer and enforce Finance Code, Chapter 151.

Finance Code, Chapter 151, is affected by the proposed repeal.

§29.3. Application for New Sale of Checks License.

§29.4. Violation of Application Processing Time.

§29.6. Net Worth and Bonding Requirements for License Holder that Conducts Currency Exchange, Transportation or Transmission Transactions.

§29.7. Exemption from Licensing.

§29.8. License Renewal.

§29.9. Extension of Time to File Annual Statement.

§29.10. Correction of Violations and Imposition of Administrative Penalty.

§29.12. Notice to Customers Regarding Complaints.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600876
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 28, 2006
For further information, please call: (512) 475-1300

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CHAPTER 33. MONEY SERVICES BUSINESSES

7 TAC §§33.13, 33.15, 33.21, 33.51

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), proposes to adopt new §33.13, concerning new license applications, §33.15, concerning violation of new license application processing times, §33.21, concerning license renewals, and §33.51, concerning providing information to customers about how to file a complaint. The new sections are proposed under the recently enacted Money Services Act (Act of May 26, 2005, 79th Leg., R.S., H.B. 2218, §1) ("MSA"), which took effect September 1, 2005.

The MSA, codified as Finance Code, Title 3, Subtitle E, Chapter 151, regulates persons that engage in the money services business in Texas, specifically the money transmission and the currency exchange businesses. Prior to the enactment of the MSA, Texas law regulated money services businesses under two separate chapters of the Finance Code. Chapter 152, the Texas Sale of Checks Act, regulated businesses that issue and sell checks, money orders, stored value cards and other payment instruments used to transfer money from one person to another. Chapter 153 regulated businesses that conduct currency exchange, transmission and transportation transactions. The MSA consolidates the regulation of persons engaged in these businesses in Texas into one statute and repeals Finance Code, Chapters 152 and 153, effective September 1, 2005.

In response to the enactment of the MSA, the commission has undertaken a rulemaking project to enact new regulations under the MSA, which new sections are located in this Chapter 33. As new sections are proposed and adopted under Chapter 33, the commission will repeal, as appropriate, the existing regulations in Chapter 29 of this title (Sale of Checks Act) and Chapter 4 of this title (Currency Exchange), which sections were adopted to implement the now-repealed Finance Code, Chapter 152, and Finance Code, Chapter 153, respectively. Ultimately, all sections of Chapter 29 and Chapter 4 will be repealed.

As explained in this preamble, the proposed new sections, if adopted, will replace existing Chapter 29 and Chapter 4 sections, the repeal of which the commission is simultaneously proposing in this issue of the *Texas Register*. Proposed new §§33.13, 33.15 and 33.51 are substantively similar to the sections that will be repealed, but conform to the provisions of the new MSA. Proposed new §33.21 reflects the requirements of the MSA with respect to license renewals and will replace existing Chapter 29 sections that are now obsolete. The proposed sections are set out in question and answer format.

Proposed new §33.13 sets out the requirements an applicant for a new license under the MSA must satisfy and procedures for accepting, evaluating and granting or denying an application. The proposed new section will replace §29.3 of this title (regarding Application for new Sale of Checks License) and §4.12(a)-(e) of this title (regarding Currency Exchange License Applications; Notices to Applicants; Application Processing Times; Abandoned Filings; Appeals), which existing sections the commission proposes to repeal.

Proposed new §33.15 establishes the process by which an applicant for a new license under the MSA may complain to the banking commissioner if the department fails to comply with the application processing times specified in proposed new §33.13(e) or (h). The proposed new section, adopted pursuant to Government Code, §2005.003, will replace §29.4 of this title (regarding Violation of Application Processing Times) and §4.12(g) and (h) of this title (regarding Currency Exchange License Applications; Notices to Applicants; Application Processing Times; Abandoned Filings; Appeals), which sections are proposed for repeal.

Proposed new §33.21, which pertains to license renewals, will replace existing §29.8 of this title (regarding License Renewal) and §29.9 of this title (regarding Extension of Time to File Annual Statement), both of which have been rendered obsolete by the MSA. The proposed new section expands upon and reflects the requirements of Finance Code, §151.207, regarding the renewal of money transmission and currency exchange licenses. Section 33.21 applies to a person that holds a valid money transmission or currency exchange license issued under the MSA, and also to a person that holds a license under repealed Finance Code, Chapter 152 or Chapter 153, that expires on August 15, 2006, and must be renewed in accordance with the MSA. The proposed new section specifies what a license holder must file to renew its license and the applicable statutory deadlines. It also establishes the procedure by which a license holder may request an extension of time to file its renewal report or pay its renewal fee and explains what is required to demonstrate the "good cause" required to justify the extension.

Proposed new §33.51 specifies the manner in which a license holder must provide information to its customers about how to file a complaint with the department. The proposed new section is substantively similar to the existing sections it will replace, §29.12 of this title (regarding Notice to Customers regarding complaints) and §4.21 of this title (regarding Information to Consumers on How to File a Complaint), which sections are proposed for repeal. However, the notice language in the proposed new section differs slightly from that in existing §29.12 and §4.21.

As proposed, the §33.51 notice provides that a customer with a complaint about a license holder's money transmission or currency exchange activity should contact the department if the complaint remains unresolved after the customer has complained to the license holder. The proposed new language is intended to benefit license holders and customers by encouraging direct communication between the two, and should also reduce unnecessary calls to the department.

The proposed new section has an effective date of July 1, 2006, the date by which the MSA requires license holders to file their renewal reports. However, proposed §33.51 permits a license holder to use the notice set out in the section or a notice that substantially conforms to the language and form of the section's notice. The department will consider the notices license holders are currently using under existing §29.12 and §4.21 of this title to be substantially conforming for purposes of compliance with the proposed section. However, the department encourages and expects license holders to transition to the new notice language within a reasonable period of time.

Stephanie Newberg, Deputy Commissioner of the Texas Department of Banking, has determined that for the period the proposed new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed new sections.

Ms. Newberg has also determined that, for each of the years the new sections as proposed will be in effect, the anticipated public benefit will be new, updated regulations that conform to and reflect the requirements of the MSA. Further, Ms. Newberg has determined that no economic cost will be incurred by a person required to comply with the proposed new sections because the department will allow license holders a reasonable time within which to revise their customer notices. There will be no adverse impact on small businesses or microbusinesses.

To be considered, comments on the proposed new section must be submitted in writing not later than 30 days after the date of publication of this notice. Comments should be addressed to Sarah Shirley, Assistant General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294, or by email to sarah.shirley@banking.state.tx.us.

The new sections are proposed under Finance Code, §151.101, which authorizes the commission to adopt rules to administer and enforce Finance Code, Chapter 151. The new sections are also proposed under Finance Code, §151.101, which authorizes the commission to prescribe time periods for the processing of new license applications, and Finance Code, §11.307, which directs the commission to adopt rules regarding consumer complaint notices.

Finance Code, Chapter 151, is affected by the proposed new section.

§33.13. How Do I Obtain a New License?

(a) Does this section apply to me? This section applies if you seek a new money transmission or currency exchange license under Finance Code, Chapter 151.

(b) What must I do to apply for a license? To apply for a new money transmission or currency exchange license, you must:

(1) submit an application on the form prescribed by the department; and

(2) fully complete the application form and provide the information and documentation as specified in the application and the department's instructions.

(c) What does the application process generally involve? The banking commissioner will review your application and, as authorized by Finance Code, Chapter 151, investigate you, your principals, and all related facts to determine if you possess the qualifications and satisfy the requirements for the license for which you apply. At any time during the review and investigation process, the commissioner may require such information as the commissioner considers necessary to evaluate your application, including an opinion of counsel or an opinion, review or compilation prepared by a certified public accountant. It is your responsibility to provide or cause to be provided all the information the commissioner requires.

(d) What is required for the department to begin processing my application?

(1) Your application must provide and be accompanied by the following at the time you submit the application to the department:

(A) your signature or the signature of your duly authorized officer, as applicable, sworn to before a notary, affirming that the information in the application and accompanying documentation is true;

(B) an application fee, in the amount established by commission rule, in the form of a check payable to the Texas Department of Banking; and

(C) if you are applying for a money transmission license:

(i) security in the amount of at least $300,000 that complies with Finance Code, §151.308, and an undertaking to increase the amount of the security if additional security is required under that section; and

(ii) an audited financial statement demonstrating that you satisfy the minimum net worth requirement established by Finance Code, §151.307(a), and that, if the license is issued, you are likely to maintain the required minimum; or

(D) if you are applying for a currency exchange license:

(i) security in the amount of $2,500 that complies with Finance Code, §151.308; and

(ii) a financial statement demonstrating your solvency.

(2) The department may refuse to process and may return to you an application submitted without all the items identified in paragraph (1) of this section. If you submit your application fee, but fail to include one or more of the other items identified in paragraph (1), the department will return or refund the fee or, if you promptly submit an application that includes the missing items, apply the fee to your subsequent application.

(e) When will the department tell me if my application is complete and accepted for filing? On or before the 15th day after the date the department receives your application, and if the application is not returned as provided for in subsection (d)(2) of this section, the department will notify you in writing that:

(1) your application is incomplete and the additional information specified in the notice is required before the department will accept your application for filing; or

(2) your application is complete and accepted for filing.

(f) When must I provide the additional information the department requires to consider my application complete and to accept it for filing?

(1) Subject to paragraphs (2), (3) and (4) of this subsection, the department must receive all information required to consider your application complete and to accept it for filing on or before the 61st day after the date the department receives your initial application.

(2) The banking commissioner may give you a 30-day extension to submit the required information if the department receives a written extension request from you before the expiration of the initial 60-day period.

(3) Upon a finding of good cause, the banking commissioner may give you an additional extension if the department receives a written request from you before the expiration of the 30-day period authorized in paragraph (2) of this subsection. Your request must explain in detail the reasons you need the additional extension. The commissioner will notify you of the decision by letter mailed to you on or before the 10th day after the date the department receives your request.

(4) After reviewing the information you provide in response to the department's initial request for additional information, the department may determine that still more information is required to consider your application complete and to accept it for filing. The department will notify you in writing if further information is required and specify the date by which the department must receive the information.

(g) What happens if I do not provide the required information?

(1) The banking commissioner may determine that your application is abandoned, without prejudice to your right to file a new application, if the department does not receive the information required in the application and department's instructions or the additional information required by the department within the time specified in subsection (f) of this section or as otherwise requested by the commissioner in writing to you.

(2) The banking commissioner will notify you in writing if your application is considered abandoned. The commissioner's determination is effective the date the department mails you the notice and may not be appealed. The department will not refund the fee you paid in connection with the abandoned application.

(h) After the department accepts my application for filing, when will I know if the application is approved? On or before the 45th day after the date the department accepts your application for filing, the banking commissioner will approve or deny your application and advise you in writing of the decision.

(i) May I appeal the denial of my application? Yes. If the banking commissioner denies your application, you may appeal the denial in accordance with Finance Code, §151.205(b).

(j) What if the department does not comply with the application processing times? If the department fails to comply with the application processing times specified in subsections (e) or (h) of this section, you may file a complaint under §33.15 of this title (relating to Failure to Comply with Application Processing Times).

§33.15. What May I Do If the Department Does Not Comply with the New License Application Processing Times?

(a) Does this section apply to me? This section applies if you applied for a new money transmission or currency exchange license under Finance Code, Chapter 151, and you believe that the department failed to comply with the application processing times specified in §33.13(e) or (h) of this title (relating to Application for New License).

(b) May I file a complaint? Yes. If the department does not process your application for a new money transmission or currency exchange license within the time periods specified in §33.13(e) or (h) of this title (relating to Application for New License), you may file a written complaint with the banking commissioner. The complaint must set out the facts regarding the delay and the specific relief you seek. The department must receive your complaint on or before the 30th day after the date the commissioner approves or denies your license application.

(c) How will the banking commissioner evaluate my complaint?

(1) The department division responsible for complying with the applicable time period must submit a written response to the banking commissioner regarding your complaint that includes any facts on which the division relies to show that good cause existed for exceeding the applicable time period.

(2) The banking commissioner will review your written complaint and the division's response. If the commissioner deems it necessary, a hearing may be held to take evidence on the matter.

(3) The banking commissioner will determine, based upon your complaint and the division's response, if the department exceeded the applicable time period and, if so, whether the responsible division established good cause for the delay.

(d) When will the banking commissioner notify me of the decision? The banking commissioner will notify you of the decision regarding your complaint on or before the 60th day after the date the commissioner receives your written complaint. The commissioner's decision is final and may not be appealed.

(e) What happens if the banking commissioner decides in my favor? If the banking commissioner decides that the department exceeded the applicable time period without good cause, the department will reimburse you all of your application fees.

(f) Does the banking commissioner's decision regarding my complaint affect the decision on my application? No. A decision in your favor under this section does not affect any decision by the banking commissioner to grant or deny your license application. The decision to grant or deny your license application is based upon applicable substantive law without regard to whether the department timely processed your application.

§33.21. How Do I Renew My License?

(a) Does this section apply to me? This section applies if you hold a valid money transmission or currency exchange license issued by the department under Finance Code, Chapter 151. This section also applies if you hold a license issued under Finance Code, Chapter 152, or Finance Code, Chapter 153, that expires on August 15, 2006 and must be renewed in accordance with Finance Code, Chapter 151.

(b) What must I file with the department to renew my license? To renew your money transmission or currency exchange license, you must:

(1) submit a renewal report that is:

(A) on the form and in the medium required by the department;

(B) signed and sworn to before a notary; and

(C) fully completed in accordance with the department's instructions, and includes as attachments the documentation specified in Finance Code, §151.207(b) and the renewal report form and instructions; and

(2) pay a renewal fee in the amount established by commission rule.

(c) When must I file my renewal report and pay my renewal fee? Under Finance Code, §151.207, you must file your renewal report and pay your renewal fee on or before July 1 of each year following initial licensing. If you do not file your report and pay your fee by that date, you must pay the late charge established by commission rule for each business day, up to and including August 15, that your report or fee is late. If you do not file your report and pay your fee and any late fees that are due by 5:00 p.m. central daylight time on August 15, your money services license expires as of that date and time and you must then immediately cease and desist from engaging in the money transmission or currency exchange business.

(d) May I obtain an extension of time to file my renewal report and pay my renewal fee? Compliance with the August 15 deadline is necessary for the department to orderly and efficiently administer and enforce Chapter 151. However, Finance Code, §151.207(f), authorizes the banking commissioner to allow you to file or complete the filing of your renewal report or pay your renewal fee at a date later than August 15 for good cause. You have the burden to demonstrate good cause.

(e) What is "good cause"?

(1) For purposes of this section, "good cause" means that you have acted diligently and taken the steps reasonably necessary to enable you to file your complete renewal report and pay your renewal fee in a timely manner, but that circumstances beyond your control prevent you from doing so.

(2) You are expected to know and comply with the requirements of Finance Code, §151.207, and this section. "Good cause" cannot be based upon your ignorance of the law or facts that you could have learned through the exercise of due diligence, or your failure to take the actions necessary to ensure timely and complete filing and payment. For example, you should know the time and information requirements necessary to obtain an audited financial statement. The inability or failure of your accountant to timely produce an audited financial statement is generally not considered to be a circumstance beyond your control.

(f) How do I ask for an extension? You must ask for the extension in writing, and the department must receive your request on or before July 1. The request must:

(1) state in detail the facts that support your claim that good cause exists for the extension;

(2) be accompanied by sworn affidavits to support the claimed facts; and

(3) state the period of time from which the extension is sought.

(g) What happens after I submit my request?

(1) The banking commissioner will review your request and determine if you have demonstrated good cause. The commissioner will notify you of the decision regarding your extension request by letter mailed to you on or before the 21st day after the department receives the request. The commissioner's decision is final and may not be appealed.

(2) As a condition of granting your extension request, the banking commissioner may require you to pay the late charge established by commission rule for each business day after August 15 that your complete renewal report or renewal fee remains due and impose such other conditions as the commissioner deems reasonably necessary.

§33.51. How do I Provide Information to My Customers about How to File a Complaint?

(a) Does this section apply to me? This section applies if you hold a money transmission or currency exchange license issued by the department under Finance Code, Chapter 151. Prior to August 15, 2006, this section also applies if you hold a license issued under Finance Code, Chapter 152, or Finance Code, Chapter 153.

(b) Definitions. Words used in this section that are defined in Finance Code, Chapter 151, have the same meaning as defined in the Finance Code. The following words and terms, when used in this section, shall have the following meanings unless the text clearly indicates otherwise.

(1) "Conspicuously posted"--Displayed so that a customer with 20/20 vision can read it from the place where he or she would typically conduct business with you or, alternatively, on a bulletin board, in plain view, on which you post notices to the general public (such as equal housing posters, licenses, Community Reinvestment Act notices, etc.).

(2) "Customer"--Any person to whom, either directly or through an authorized delegate, you provide or have provided money transmission or currency exchange products or services or for whom you conduct or have conducted a money transmission or currency exchange transaction.

(3) "Privacy notice"--Any notice regarding a person's right to privacy that you are required to give under a specific state or federal law.

(4) "Required notice"--The notice described in subsection (d).

(c) Must I provide notice to customers about how to file complaints? Yes. You must tell each of your Texas customers how to file a complaint concerning the money transmission or currency exchange business you conduct under Finance Code, Chapter 151, in accordance with this section.

(d) What must the notice say?

(1) Effective July 1, 2006, you must use the following notice or a notice that substantially conforms to the language and form of the following notice with respect to your money transmission or currency exchange business: After first contacting (Name of License Holder), if you still have an unresolved complaint regarding the company's money transmission or currency exchange activity, please direct your complaint to: Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705, 1-877-276-5554 (toll free), www.banking.state.tx.us.

(2) You must provide the required notice in the language in which the transaction is conducted.

(e) How and where must I provide the required notice?

(1) If a state or federal law requires you to send a privacy notice to your customers, you must include the required notice with each privacy notice.

(2) If you maintain a website by which a customer may remit money for transmission or obtain information about you or the customer's transaction or an existing account, you must include the required notice on your website. The notice must be prominently displayed on the initial page the customer uses to initiate the remittance or access the information, or on a page available no more than one link from the initial page. The link must clearly describe the information available by clicking the link, e.g., "Texas customers click here for

information about filing complaints about our money transmission or currency exchange product or service."

(3) In addition to including the required notice in a privacy notice in accordance with paragraph (1) and on your website in accordance with paragraph (2) of this subsection, you must tell customers how to file complaints by one or more of the following methods:

(A) You may include the required notice in at least 8 point type, on each payment instrument or other access device or receipt used in connection with your money transmission or currency exchange business, provided that:

(i) the payment instrument or other access device constitutes the only means of accessing the money received for transmission; or

(ii) you issue a receipt for every money transmission or currency exchange transaction you conduct.

(B) If you personally receive all the funds paid by your customers, you may conspicuously post the required notice where you conduct money transmission or currency exchange activities with customers on a face to face basis.

(C) You may provide each customer with the required notice separately, provided that:

(i) not later than the time the transaction is conducted, you deliver the required notice in a form that your customer can retain, in at least 10 point type; or

(ii) if you use an access device, such as a stored value card, in your money services business and mail the device to your customer, you include the required notice in the mailing; and

(iii) if the same access device may be used continuously, such as a reloadable stored value card, you also deliver the required notice to your customer at least once every twelve months. You may include the required notice with a privacy statement, with or on another statement, or by another means so long as the customer actually receives the notice within each twelve-month period.

(4) If your business is entirely internet based, so that account relationships and transactions are initiated solely by means of the internet, the additional disclosures described in paragraph (3) of this subsection are not required.

(f) How do I provide the required notice if I conduct business through authorized delegates?

(1) If you conduct business through one or more authorized delegates, each authorized delegate must provide the required notice by one or more of the methods described in subsection (e)(3) of this section. You must specify the method or methods to be used by your authorized delegate and provide your authorized delegate with the means by which to give the notice you select.

(2) If your authorized delegate personally receives all funds paid by your customers and you require your authorized delegate to post the required notice described in subsection (e)(3)(B) of this section, you may use one posted notice to provide the required notice and the authorized delegate designation required under Finance Code, §151.403(a)(6).

(g) Am I subject to an enforcement action if I do not provide the required notice? Yes. You are subject to enforcement sanctions under Finance Code, Chapter 151, Subchapter H, if you:

(1) fail to provide the required notice in accordance with this section; or

(2) fail to specify the method and provide the means by which your authorized delegate must give the required notice in accordance with subsection (f)(1) of this section.

(h) Is my authorized delegate subject to an enforcement action if the delegate does not provide the required notice? Yes, if you have complied with subsection (f)(1) of this section. If you have specified the method and provided the means by which your authorized delegate must give the required notice, your authorized delegate is subject to enforcement sanctions if the delegate fails to provide the required notice as directed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600877
Everette D. Jobe
Certifying Official
Texas Department of Banking
Proposed date of adoption: April 28, 2006
For further information, please call: (512) 475-1300

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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 77. LOANS, INVESTMENTS, SAVINGS, AND DEPOSITS

SUBCHAPTER B. SAVINGS AND DEPOSITS

7 TAC §77.116

The Finance Commission of Texas ("Finance Commission") proposes to adopt new 7 TAC §77.116, Pledging of Assets to Secure Deposits of Certain Public Purpose Entities. The new section is proposed to implement amendments to *Finance Code* §93.001(c)(5) to define member-owned utilities (such as electric cooperatives and water supply corporations) and certain economic development corporations as "entities that serve a public purpose" for purposes of the amended statute.

Prior to September 1, 2005, *Finance Code* §93.001(c)(5) permitted a state charted savings bank to pledge its assets to secure the deposits of any state or of a political corporation or political subdivision of any state. This provision allowed a state savings bank to pledge savings bank assets to secure the deposits of public funds which were in excess of the limits on deposit account insurance provided by the Federal Deposit Insurance Corporation. The authority to pledge assets to secure the uninsured portion of large deposits did not extend to non-profit non-governmental entities which provide necessary public services such as utility services or economic development assistance. H.B. 955 as passed by the 79th Texas Legislature amended *Finance Code* §93.001(c)(5) to grant state chartered savings banks the authority to pledge savings bank assets to secure the deposits of any "other entity that serves a public purpose according to rules adopted by the Finance Commission." This new rule establishes the definition of those entities that the Finance Commission deem to "serve a public purpose" as contemplated by the amended statute. The rule defines these entities to include

electrical cooperatives, telephone cooperatives, nonprofit water supply and sewer corporations, economic development corporations and any not for profit entity which the Savings and Mortgage Lending Commissioner determines provides utility services or economic development services similar to those entities specifically identified in the rule.

Danny Payne, Savings and Mortgage Lending Commissioner, has determined that for the first five-year period that the new section, as proposed, will be in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering this section and is not expected to increase or decrease the net revenue of the Department from the industry.

Mr. Payne estimates that for the first five years that the proposed new section is in effect, the public will benefit by the state savings bank being authorized to provide the same kind of security to back deposits of these special public purpose entities as that provided to back the uninsured portion of deposits of public funds. No difference will exist between the cost of compliance for small business and the cost of compliance for the largest business affected by the new section. This further insures that a failure of the savings bank would not impair the ability of these public purpose entities to carry out their essential functions because of a loss of their deposits.

Comments on the proposed new rule may be submitted in writing to Danny Payne, Commissioner, Department of Savings and Mortgage Lending, 2601 North Lamar, Suite 201, Austin, Texas 78705-4294, or e-mailed to SMLinfo@sml.state.tx.us no later than 30 days from the date that this proposed new rule is published in the *Texas Register*.

The new section is proposed under the *Finance Code* §11.302(a) which authorizes the Finance Commission to adopt rules applicable to savings associations and savings banks.

The section of the *Finance Code* affected by the proposed new rule is *Finance Code* §93.001.

§77.116. Pledging of Assets to Secure Deposits of Certain Public Purpose Entities.

A savings bank may pledge its assets to secure the deposits of an entity that serves a public purpose. For purpose of this section, an entity serves a public purpose if it is:

(1) an electrical cooperative organized under Chapter 161 of the *Utilities Code*;

(2) a telephone cooperative organized under Chapter 162 of the *Utilities Code*;

(3) a nonprofit water supply or sewer service corporation organized under Chapter 67 of the *Water Code*;

(4) a not for profit business development corporation organized under Chapter 23, Subchapter B of the *Business Organizations Code*; or

(5) any other member owned cooperative or not for profit corporation organized under a special statute to provide utility service or economic development assistance or whose purpose the commissioner determines is similar to those entities listed in paragraphs (1) - (4) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600889
John Fleming
General Counsel
Texas Department of Savings and Mortgage Lending
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 475-1353

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER J. CHANGES IN CORPORATE STATUS

7 TAC §91.1004

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Credit Union Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Credit Union Commission proposes to repeal §91.1004 concerning conversion of charter. This rule is being replaced by §§91.1005, 91.1006, 91.1007, and 91.1008 which update the rule and divide the rule into four distinct rules for ease of use and clarity.

The repeal of the rule is proposed as a result of the Department's general rule review and comments from interested parties. Since there had recently been some controversy surrounding two credit union conversions to mutual savings institutions, the Commission's Legislative Advisory Committee directed the Department to seek input from interested parties and develop a more comprehensive and reasoned proposal regarding charter conversions. The Department participated in six private meetings with over 50 credit union presidents, conducted a public forum for credit unions and their members, and held a public hearing for all interested persons. Currently, § 91.1004 addresses five different types of conversions. The Department believes that greater clarity and ease of use could be achieved if the existing §91.1004 were separated into four distinct rules.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the rule is repealed there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the rule is repealed, the public benefits anticipated as a result of repealing the rule will be ease of use by credit unions and the public with the new rule replacing the repealed rule. There is no anticipated effect on small businesses as a result of repealing the rule. There is no economic cost anticipated to credit unions or individuals for repealing the rule.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory

Committee meeting on Friday, May 19, 2006 at 9:00 am at 914 East Anderson Lane, Austin, Texas 78752.

The repeal is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §§123.003, which allows a credit union to engage in any activity or exercise any power it could if it were operating as a federal credit union; 122.201, which authorizes the Commission to adopt rules regarding conversions to a federal credit union; 122.202, which authorizes the Commission to adopt rules regarding conversions to an out-of-state credit union; and 122.203, which authorizes the Commission to adopt rules regarding conversions to a state credit union.

The specific sections affected by the proposed repeal are Texas Finance Code, §§123.003, 122.201, 122.202, 122.203.

§91.1004. Conversion of Charter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600915
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 837-9236

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7 TAC §91.1005

The Credit Union Commission proposes new §91.1005, concerning conversion to a Texas credit union. The new rule updates and replaces §91.1004, concerning conversion of charter.

The new rule is proposed as a result of the Department's general rule review and comments from interested parties. Since there had recently been some controversy surrounding two credit union conversions to mutual savings institutions, the Commission's Legislative Advisory Committee directed the Department to seek input from interested parties and develop a more comprehensive and reasoned proposal regarding charter conversions. The Department participated in six private meetings with over 50 credit union presidents, conducted a public forum for credit unions and their members, and held a public hearing for all interested persons. Currently, §91.1004 addresses five different types of conversions. The Department believes that greater clarity and ease of use could be achieved if the existing §91.1004 were separated into four distinct rules. Accordingly, new §91.1005 is being proposed to deal exclusively with conversions to a state credit union.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There is no anticipated effect on small businesses as a result of adopting the new rule. There is no economic cost anticipated to credit unions or individuals for complying with the new rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 a.m. at 914 East Anderson Lane, Austin, Texas 78752.

The new rule is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §122.203, which authorizes the Commission to adopt rules regarding conversions to a state credit union.

The specific section affected by the proposed rule is Texas Finance Code, §122.203.

§91.1005. Conversion to a Texas Credit Union.

(a) Authority to convert. A federal credit union or an out of state credit union is authorized to convert to a credit union incorporated under the laws of this state by Section 122.203 of the Act.

(b) Requirements for conversion. A credit union wishing to convert to a credit union incorporated under the laws of this state shall comply with the following requirements:

(1) Submit a complete application on a form and in a manner prescribed by the commissioner;

(2) Furnish evidence that the current federal or state regulatory agency having jurisdiction over the applicant has no preliminary objection to the conversion plan;

(3) Submit to a conversion examination by the department and pay the supplemental examination fee prescribed in §97.113 of this title (relating to Operating Fees). The commissioner may waive the examination or the fee, upon finding good cause;

(4) Furnish evidence confirming that the applicant has complied with all applicable requirements of and has completed the conversion in a manner satisfactory to the insuring organization and the current federal or state regulatory agency; and

(5) Furnish evidence that the applicant has established or will relocate its principal place of business in a specific location in the State of Texas.

(c) Approval. The commissioner shall approve the conversion once the conditions required by this section have been met and the commissioner finds that the applicant:

(1) is financially sound;

(2) has no material supervisory problems; and

(3) can reasonably be expected to conduct its operations in a safe and sound manner and in accordance with the laws of this state. The commissioner may approve the conversion conditioned upon specific requirements being met, but the certificate of incorporation shall not be issued unless such conditions have been met.

(d) Effective date. The conversion shall become effective immediately upon the issuance of the certificate of incorporation or on a stipulated date within 90 days of the conversion approval. On request and for good cause shown, the commissioner may grant a reasonable extension of the effective date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600919
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 837-9236

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7 TAC §91.1006

The Credit Union Commission proposes new §91.1006, concerning conversion to a federal or out-of-state credit union. The new rule updates and replaces §91.1004, concerning conversion of charter.

The new rule is proposed as a result of the Department's general rule review and comments from interested parties. Since there had recently been some controversy surrounding two credit union conversions to mutual savings institutions, the Commission's Legislative Advisory Committee directed the Department to seek input from interested parties and develop a more comprehensive and reasoned proposal regarding charter conversions. The Department participated in six private meetings with over 50 credit union presidents, conducted a public forum for credit unions and their members, and held a public hearing for all interested persons. Currently, §91.1004 addresses five different types of conversions. The Department believes that greater clarity and ease of use could be achieved if the existing §91.1004 were separated into four distinct rules. Accordingly, new §91.1006 is being proposed to deal exclusively with conversions to a federal or out-of-state credit union.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There is no anticipated effect on small businesses as a result of adopting the new rule. There is no economic cost anticipated to credit unions or individuals for complying with the new rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 a.m. at 914 East Anderson Lane, Austin, Texas 78752.

The new rule is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §122.201, which authorizes the Commission to adopt rules regarding conversions to a federal credit union; and §122.202, which authorizes the Commission to adopt rules regarding conversions to an out-of-state credit union.

The specific sections affected by the proposed rule are Texas Finance Code, §122.201 and §122.202.

§91.1006. Conversions to a Federal or Out-of-State Credit Union.

(a) Authority to Convert. A credit union organized under the laws of this state is authorized to convert to a federal credit union or an out-of-state credit union by Sections 122.201 and 122.202 of the Act.

(b) Requirements for Conversion. A credit union wishing to convert to a federal credit union or an out-of-state credit union shall comply with the following requirements:

(1) Furnish evidence to the department that a conversion proposal has been approved by a two-thirds vote of the board of directors;

(2) Submit copies of all filings made with any state or federal regulatory agency and insuring organization with jurisdiction over any aspect of the conversion process;

(3) Furnish evidence confirming that the insuring organization and the acquiring state or federal regulatory agency have no preliminary objections to the plan;

(4) Submit a vote certification as required by §91.1008(c) of this chapter showing that the conversion proposal was approved by an affirmative vote of a majority of the eligible members of the credit union voting; and

(5) Furnish written evidence confirming that the credit union has met all of the conversion requirements of the insuring organization and the acquiring state or federal regulatory agency.

(c) Approval. The commissioner shall approve the conversion if all of the conditions required by this section have been met, unless the commissioner determines the conversion is being made to circumvent a pending supervisory action that is about to be or has been initiated by the commissioner because of a concern over the safety and soundness of the credit union.

(d) Effective Date. Once the commissioner has approved the conversion, it shall become effective upon the issuance of a charter or certificate of incorporation from the acquiring state or federal regulatory agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600918
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 837-9236

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7 TAC §91.1007

The Credit Union Commission proposes new §91.1007 concerning conversion to a mutual savings institution. The new rule updates and replaces §91.1004 concerning conversion of charter.

The new rule is proposed as a result of the Department's general rule review and comments from interested parties. Since there had recently been some controversy surrounding two credit union conversions to mutual savings institutions, the Commission's Legislative Advisory Committee directed the Department to seek input from interested parties and develop a more comprehensive and reasoned proposal regarding charter conversions. The Department participated in six private meetings with over 50 credit union presidents, conducted a public forum for credit unions and their members, and held a public hearing for all interested persons. Currently, §91.1004 addresses five different types of conversions. The Department believes that greater clarity and ease of use could be achieved if the existing §91.1004 were separated into four distinct rules. Accordingly, new §91.1007 is being proposed to deal exclusively with conversions to a mutual savings institution.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There is no anticipated effect on small businesses as a result of adopting the new rule. There is no economic cost anticipated to credit unions or individuals for complying with the new rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 a.m. at 914 East Anderson Lane, Austin, Texas 78752.

The new rule is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §123.003, which allows a credit union to engage in any activity or exercise any power it could if it were operating as a federal credit union.

The specific section affected by the proposed rule is Texas Finance Code, §123.003.

§91.1007. Conversion to a Mutual Savings Institution.

(a) Authority to convert. A credit union organized under the laws of this state is authorized to convert to a mutual savings bank or association by §123.003 of the Act.

(b) Requirements for conversion. A credit union that is considering converting to a mutual savings bank or association must comply with the following requirements:

(1) Preliminary communication with membership and department. At least thirty days prior to a final vote by the board of directors to formally adopt a conversion proposal, the credit union shall send notice to the department and each member advising that the board is considering a possible conversion to a mutual savings bank or association. The notice shall, at a minimum, contain the following information:

(A) a prominent legend in bold-face type that advises members of a potential conversion;

(B) the electronic availability of information related to a potential conversion;

(C) a telephone number and e-mail address that members may use to request copies of the potential conversion information that is available by electronic means;

(D) the ability of members to submit written comments on the potential conversion; and

(E) a clear, concise, and impartial description of the potential conversion to be considered by the board.

(2) Information posted on Internet web site. The credit union shall post information related to a potential conversion on the credit union's principal Internet web site at least thirty days prior to a vote by the board of directors to adopt a proposal of conversion. The posted information shall, at a minimum, discuss:

(A) The business purposes that might be accomplished by a conversion;

(B) The differences between and similarities of a credit union and a mutual savings institution;

(C) An estimate of the anticipated conversion expenses;

(D) The methods by which a member may request a copy of the posted information;

(E) The method and timeline for members to submit written comments on the potential conversion; and

(F) The process that will be followed if the board formally adopts a conversion proposal.

(3) Written comments from members. The board shall provide members a reasonable opportunity to submit written comments relating to a potential conversion. The board may hold a special meeting to receive member input regarding the potential conversion. It is within the board's discretion to determine the type, number, duration, and location of any special meeting(s). Before taking a final vote on a conversion proposal, the board should consider all written comments and any other member input received at any special meeting.

(4) Adoption of a conversion proposal by the board. Subsequent to the written comment period, the credit union may adopt, by the affirmative vote of at least two-thirds of the members of its board of directors, a conversion proposal consistent with this section. The credit union shall notify the department of the board's approval of the proposal within 5 days of the approval. In addition, the following documents must be sent to the department as soon as reasonably practical:

(A) Copies of any filings made with any state or federal regulatory agency and insuring organization with jurisdiction over any aspect of the conversion process;

(B) A copy of the disclosure materials and the ballot to be sent to eligible members relative to voting on the conversion proposal;

(C) An estimated budget of the anticipated conversion expenses including legal, postage and mailing, advertising, printing, consulting fees, examination and operating fees, and any overtime or other employee compensation to be paid exclusively as a result of the conversion; and

(D) Any other information reasonably requested by the commissioner.

(5) Membership approval. The members of the credit union must approve the conversion proposal by an affirmative vote of a majority of those eligible members who vote on such proposal,

unless the bylaws require a higher vote threshold. The credit union shall submit a vote certification as required by §91.1008(c) of this chapter showing that the conversion proposal was approved by the members of the credit union;

(6) Insuring organization requirements. The credit union must furnish written evidence of its compliance with any voting procedures and disclosure requirements imposed by its insuring organization; and

(7) Other regulatory oversight. The credit union must furnish written evidence that it has met all conversion requirements of the acquiring state or federal regulatory agency.

(c) Notice, disclosure materials, and ballot mailed to members. The credit union shall mail to each eligible member, as defined in §91.1008 of this Chapter, a notice advising the member of the adoption and filing of the conversion proposal. The notice must include a prominent statement that the conversion will be decided by a majority of eligible members who vote on the issue (unless the bylaws require a higher vote threshold), and that each eligible member is only entitled to vote once. Also, incorporated with the mailing of the notice, eligible members shall be provided with plain language disclosures of material facts and information to be used as a basis for reaching an informed decision to vote on the conversion. The disclosures and ballot shall be submitted to the commissioner for approval. The commissioner may require changes in the disclosures and ballot provided to eligible members to assure full and adequate disclosure prior to the documents being mailed to eligible members.

(d) Conflict of interest. A director, officer, committee member, agent, or senior management employee of the credit union, and immediate family members of such individuals shall not, directly or indirectly, receive a fee, commission, or other consideration, other than that person's usual salary or compensation, for aiding, promoting, or assisting in a conversion under this section.

(e) Continuity of existence. The corporate existence of a credit union converting under this rule shall continue in its successor. Each member shall be entitled to receive a share or deposit account or accounts in the converted institution equal in amount to the value of accounts held in the former credit union subject to any lien or right of offset held by the credit union.

(f) Approval. The commissioner shall approve the conversion if all of the conditions required by this section have been met, unless the commissioner determines the conversion is being made to circumvent a pending supervisory action that is about to be or has been initiated by the commissioner because of a concern over the safety and soundness of the credit union.

(g) Effective date. Once the commissioner has approved the conversion, it shall become effective upon the issuance of a charter or certificate of incorporation from the acquiring state or federal regulatory agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

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Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 837-9236

7 TAC §91.1008

The Credit Union Commission proposes new §91.1008 concerning conversion voting procedures and restrictions and filing requirements. The new rule updates and replaces §91.1004 concerning conversion of charter.

The new rule is proposed as a result of the Department's general rule review and comments from interested parties. Since there had recently been some controversy surrounding two credit union conversions to mutual savings institutions, the Commission's Legislative Advisory Committee directed the Department to seek input from interested parties and develop a more comprehensive and reasoned proposal regarding charter conversions. The Department participated in six private meetings with over 50 credit union presidents, conducted a public forum for credit unions and their members, and held a public hearing for all interested persons. Currently, §91.1004 addresses five different types of conversions. The Department believes that greater clarity and ease of use could be achieved if the existing §91.1004 were separated into four distinct rules. Accordingly, new §91.1008 is being proposed to address the vote procedures, restrictions, and filing requirements for all conversions.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There is no anticipated effect on small businesses as a result of adopting the new rule. There is no economic cost anticipated to credit unions or individuals for complying with the new rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 a.m. at 914 East Anderson Lane, Austin, Texas 78752.

The new rule is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §§123.003, which allows a credit union to engage in any activity or exercise any power it could if it were operating as a federal credit union; 122.201, which authorizes the Commission to adopt rules regarding conversions to a federal credit union; 122.202, which authorizes the Commission to adopt rules regarding conversions to an out-of-state credit union; and 122.203, which authorizes the Commission to adopt rules regarding conversions to a state credit union.

The specific sections affected by the proposed rule are Texas Finance Code, §§122.201, 122.202, 122.203, and 123.003.

§91.1008. Conversion Voting Procedures and Restrictions; Filing Requirements.

(a) Voting procedures. Eligible members may vote on a plan of conversion by written ballot either filed in person at a special meeting held on the date set for the vote or mailed by the member. The vote on a conversion proposal must be by secret ballot. Mail balloting must be conducted in accordance with §91.302 of this Chapter.

(b) Definitions.

(1) "Eligible Member" means a member of a credit union who is approved and fully qualified for membership in accordance with the credit union's bylaws and written policies as of the eligibility record date.

(2) "Eligibility Record Date" means the cut off date for determining eligible members, which shall be deemed to be the last day of the month immediately preceding the date the credit union's board of directors notifies members or the public that it is contemplating a conversion.

(c) Voting ballots. All ballots must include the following:

(1) The name of the credit union and the name of the proposed institution if the conversion is approved. This information may be incorporated into the body of the voting options;

(2) The date and time by which the ballot must be received if mailed; and

(3) The following statements, printed in a manner acceptable to the commissioner:

(A) The conversion will be decided by a majority of credit union members who vote on the issue (unless the bylaws require a higher vote threshold);

(B) Once a vote has been cast, it may not be changed; and

(C) A "yes" vote means the credit union will become a (insert conversion entity type) and a "no" vote means the credit union will remain a (insert state or federal) credit union.

(D) Vote certification. Within ten business days following a vote on a plan of conversion, the credit union shall file with the department a certified copy of a resolution of the board of directors stating that voting on the conversion has been completed in accordance with this section and setting out the following information:

(i) The total number of members eligible to vote;

(ii) The number of eligible members who voted (either at the special meeting or by mail); and

(iii) The total number of votes cast in favor and against the plan of conversion.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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CHAPTER 93. ADMINISTRATIVE PROCEEDINGS
SUBCHAPTER B. GENERAL RULES

7 TAC §93.214

The Credit Union Commission proposes a new §93.214 concerning recovery of Department costs. The new rule authorizes the Administrative Law Judge to allocate the costs of an administrative hearing among the parties.

The new rule is proposed as a result of the Department's general rule review. The Commission believes that there is a need for a rule to more equitably allocate the costs of an administrative hearing. Currently, with the exception of the costs for transcribing the hearing and preparing the original transcript, the Department and the State must cover the expenses incurred in conducting the hearing. Since the Department does not receive appropriations to pay these costs, the proposal authorizes the Administrative Law Judge to determine an appropriate allocation of costs among the parties.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed rule is in effect, the public benefits anticipated as a result of enforcing the rule will be lower costs to State government. There is no anticipated effect on small businesses as a result of adopting the new rule. There may be a small economic cost to credit unions or individuals for complying with the new rule if adopted, if the Administrative Law Judge rules that some of the hearing costs should be borne by a credit union or individual who is a party to the hearing.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 am at 914 East Anderson Lane, Austin, Texas 78752.

The new rule is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific sections affected by the proposed rule are Texas Finance Code, §§122.006, 122.007, 122.153, 122.259, 126.105.

§93.214. Recovery of Department Costs.

The ALJ may allocate costs incurred by the department among the parties in accordance with applicable law. Notwithstanding any other provision of this chapter, the ALJ may impose costs that are solely or primarily attributable to a particular party against that party.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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SUBCHAPTER C. APPEALS OF PRELIMINARY DETERMINATIONS ON APPLICATIONS

7 TAC §93.301

The Credit Union Commission proposes an amendment to §93.301 concerning finality and request for SOAH hearing. The amendment adds a provision which makes the Commissioner's preliminary decision final where there is no modification and no protest or comment was received on the application.

The amendment to the rule is proposed as a result of the Department's general rule review.

Kerri T. Galvin, General Counsel, has determined that for the first five year period the amended rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be to avoid unnecessary delays in giving effect to the Commissioner's decision on uncontested applications. There is no anticipated effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amendments if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699. Oral comments on the proposal can be made at the Commission's Legislative Advisory Committee meeting on Friday, May 19, 2006 at 9:00 am at 914 East Anderson Lane, Austin, Texas 78752.

The amendment is proposed under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific sections affected by the proposed amendment are Texas Finance Code, §§122.006, 122.007, 122.153, 122.259, 126.105.

§93.301. Finality and Request for SOAH Hearing.

(a) Except as provided otherwise by this chapter, the preliminary decision of the commissioner becomes final 20 days from the date of service, unless prior thereto, an applicant or protestant files with the commissioner a written request for hearing. In the event that a timely written request for hearing is filed by any party, the commissioner's preliminary decision is withdrawn. The commissioner may, at the commissioner's sole discretion, refer any matter to SOAH for hearing prior to entering a preliminary decision.

(b) Notwithstanding paragraph (a), if an application is approved without modification and neither a protest or comment was received during the notice period, the commissioner, in the exercise of discretion, may determine that the preliminary decision should become final upon the issuance of the preliminary decision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Commissioner
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For further information, please call: (512) 837-9236

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 313. STATE-SPONSORED INSPECTION AND DISPUTE RESOLUTION PROCESS (SIRP)

10 TAC §§313.2, 313.5 - 313.9, 313.11, 313.13, 313.15 - 313.21

The Texas Residential Construction Commission (commission) proposes amendments to §§313.2, 313.5 - 313.9, 313.11, 313.13, 313.15 - 313.21 of 10 TAC Chapter 313, regarding the State-sponsored Inspection and Dispute Resolution Process (SIRP).

Generally, the proposed amendments clarify the procedures for participation in the SIRP. The proposed amendments to §313.2, Prerequisite to State-sponsored Inspection and Dispute Resolution Process (SIRP), better describes the actions that the commission may take if a homeowner fails to provide thirty days notice to a builder of alleged defects prior to filing a request for the SIRP.

The proposed amendments to §§313.5, 313.6, 313.8 and 313.15 clarify the meaning of the adopted rules. The proposed amendment to §313.7 better explains the items that a requestor must submit with the request and information that a recipient of notice of a request must submit to the commission. The proposed amendment to §313.9 describes the procedure for withdrawal if a requestor fails to timely provide information to complete a request to participate in the SIRP.

The proposed amendments to §313.16 and §313.17 more fully describe the commission's expectations regarding the third-party inspector's duties to complete the report, revise the report or re-inspect an alleged defect on remand.

The proposed amendments to §313.11 clarify the adopted rule, incorporate language previously contained in §313.12, which the commission intends to repeal upon the effective date of the adoption of changes to §313.11, and provide a more comprehensive description of the process by which a qualified third-party inspector is first identified by the commission, the strike period that follows and the subsequent notice to the third-party inspector of the appointment. The rule amendments also describe the third-party inspector's obligation to notify the commission of any potential conflict of interest after the commission informs the inspector of the assignment. In addition, the proposed amendments explain that during the strike period the parties are not to initiate contact with the third-party inspector.

Proposed amendments to §313.13 better describe the third-party inspector's obligations to coordinate the date for the inspection with both parties and the parties obligations to work cooperatively with the inspector to arrive at a mutually agreeable time and date for the inspection and the third-party inspector's duties for the inspection report. In addition, the proposed amendments incorporate portions of §313.14, which the commission intends to repeal upon the effective date of the amendment of §313.13.

Proposed amendments to §313.18 clarify the commission's delegation of authority to the Executive Director to order a builder to reimburse SIRP inspection fees if at least one alleged construction defect is affirmed. Further, the amendments create a mechanism by which a builder can appeal the order if the builder is able to show that he made an offer to make substantially the same repairs as recommended by the final unappealable report issued by the commission. In addition, the proposed amendments make clear that the commission will reimburse any homeowner who pays a fee to initiate an SIRP if a final unappealable report issued by the commission affirms at least one alleged construction defect.

Proposed amendments to §§313.19, 313.20 and 313.21 clarify the appeal process and the obligations of the appeal panel regarding the appeal and the third-party inspector regarding any matter remanded to him after an appeal.

Ms. Susan Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed amended rules are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for the first five years the amended rules are in effect the public will benefit from more clear and precise rules that explain how to participate in the SIRP process. There will not be an effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amended rules are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed amendments may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to susan.durso@trcc.state.tx.us. For comments submitted electronically, please include "Amended SIRP Rules" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed rules in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The amendments are proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 and Subtitle D of Title 16 of the Property Code, which provides for the implementation of the SIRP and Property Code §§27.001 - 27.004 to the extent that those sections relate to Title 16 Subtitle D of the Property Code.

The amendments are proposed to implement Property Code §408.001 and §426.004.

§313.2. Prerequisite to State-sponsored Inspection and Dispute Resolution Process (SIRP).

(a) Before a homeowner may file a request to initiate the SIRP, a homeowner must give the builder a 30-day written notice of any claimed construction defect(s).

(b) After notice has been provided to the builder as required in §313.2(a), the homeowner must also provide the builder, or its designated consultants, a reasonable opportunity to inspect the affected home if the builder requests such an opportunity.

(c) If a homeowner contacts the commission to initiate the SIRP before the homeowner has provided the builder with the required written notice and the inspection opportunity, the homeowner will be provided with the requirements and the procedures for filing a request to initiate the SIRP, and instructions on the procedure to initiate the SIRP if the dispute remains unresolved.

(d) If the homeowner has failed to provide thirty days notice for every item listed in a SIRP request, the commission will:

(1) exclude the item from the list of alleged defects to be inspected; or

(2) at the homeowner's request, hold the SIRP until the builder has had the requisite thirty days notice for all alleged items to be inspected; or

(3) allow the builder to waive the requisite notice under this section if the builder agrees in writing that the inspector can inspect and report on alleged defects for which the builder did not receive thirty days notice before moving forward with the SIRP requested inspection of those items.

§313.5. Filing a Request to Initiate the SIRP.

(a) Either the homeowner or the builder may initiate the SIRP by filing a request with the commission.

(b) If the affected home is not registered with the commission at the time the request is filed, the requesting party must also register the home with the commission by submitting a commission-prescribed home registration form and the appropriate fee. A builder who failed to register the affected home in accordance with Chapter 303, Registration of Homes, shall reimburse [~~the homeowner~~] the cost of the home registration fee if paid by the homeowner.

(c) When a person contacts the commission to initiate the SIRP, the commission will provide the person with information necessary to file a request, information on the applicable fees to request [~~for~~] a third-party inspection, the registration status of the affected home and instructions to register an unregistered home, if applicable.

§313.6. Information Required for the Request.

(a) The request shall be submitted on a commission-prescribed form and must include:

(1) a description of the transaction giving rise to the dispute, including,

(A) the date on which the title transferred from the builder to the initial homeowner, if the transaction giving rise to the dispute was for new home construction on the builder's property; or

(B) the date on which the agreement describing the transaction was signed or work commenced, whichever is earlier, if the transaction giving rise to the dispute did not involve a title transfer, including new home construction on the homeowner's property, a material improvement to an existing home or an improvement to the interior of an existing home when the cost of the work exceeds $20,000.

(2) credible documentation that establishes that the homeowner provided the builder with or that the builder received written notice of the alleged construction defect(s) at least thirty days prior to filing the request if the request was initiated by the homeowner;

(3) a general description of the builder's response to the homeowner's notice of alleged construction defect(s) provided pursuant to §313.2(a) of this chapter, and a copy of the written response, if any;

(4) a reasonably detailed description of the alleged construction defect(s) included in the request;

(5) a copy of any applicable written warranty;

(6) [~~(5)~~] an itemized list of all out-of-pocket expenses and engineering or consulting fees incurred by the requestor in connection with the alleged construction defect(s);

(7) [~~(6)~~] a list of the names and addresses of all professionals or other persons, known to the requestor at the time of the filing of the request, who have inspected the alleged construction defect(s) on behalf of the requestor; and

(8) [~~(7)~~] any documents or other tangible things that depict the nature and cause of the alleged construction defect(s) and that depict the nature and extent of repairs necessary to remedy the construction defect(s), including, expert reports, photographs, and videotapes, if these documents and tangible things are either within the requestor's physical possession or if the requestor has the right to obtain the document or tangible thing from a third party, such as an agent or a representative of the requestor.

(9) [~~(8)~~] A requestor is not required to provide as a part of a SIRP request any of the following [~~The following are excluded from the provisions of subsections (a)(6) and (a)(7) of this section~~]:

(A) any documents or tangible things that were prepared or developed in anticipation of litigation, for trial or for an arbitration proceeding by the requestor's attorneys or by the attorneys' representatives or agents for the requestor;

(B) any documents or tangible things that reflect communications between a requestor and the requestor's attorneys or the attorneys' representatives or agents on behalf of the requestor and that were made in anticipation of litigation, for trial or for an arbitration proceeding; or

(C) the name of any person who inspected the home on behalf of the requestor in connection with the construction defect(s) alleged in the request before the SIRP request was submitted to the commission, so long as the requestor will not call upon this person as an expert witness or use any of the materials prepared by this person during either the SIRP or any action between the builder and the homeowner that arises out of an alleged construction defect that is the subject of the request.

(b) With regard to information provided under subsection (a)(7)[~~(a)(6)~~] and (a)(8)[~~(a)(7)~~], a requestor who fails to submit the name of any person who inspected the home on behalf of the requestor prior to the filing of a SIRP request in connection with the alleged construction defect(s) may be prohibited from designating that person as an expert witness and from using any materials prepared by such person in the SIRP or any action arising out of any alleged construction defect(s) that is the subject of the request.

§313.7. Notice of the Request.

(a) The requestor shall send a copy of the request and copies of all information submitted to the commission along with the request, by certified mail, return receipt requested, to all other interested parties to the dispute.

(b) A copy of the request and the submitted information mailed to other interested parties under subsection (a) of this section must also be mailed to counsel for any interested party represented by counsel, if the identity of counsel is known to the requestor.

(c) An interested party who receives a notice that a request has been submitted to the commission and who has information pertaining to the determination of eligibility under §313.9 of this chapter shall submit that information to the commission and provide a copy of the information to the requestor within ten days of receiving a copy of the notice.

(d) A homeowner is required to request a SIRP prior to initiating an action for damages or other relief arising from an alleged construction defect. If the commission determines that a civil suit or an arbitration is pending between the homeowner and the builder for relief arising from an alleged construction defect, the commission will not proceed with a SIRP unless the commission determines that compliance with Subtitle D of Title 16 of the Property Code is not required or receives an order from the court or arbitration tribunal dismissing the action or abating the action during the pendency of the SIRP.

§313.8. Fees for Filing Requests [~~Inspection~~ fee].

(a) The commission will establish fees [~~a fee~~] that are [~~is~~] commensurate with the scope of the requested inspection and the type of construction defect(s) alleged [~~and which is set at the lowest possible rate necessary to cover the cost associated with the third-party inspection~~].

(b) The commission shall publish the established fees [~~fee~~] on its website and make them [~~it~~] available to the public in writing.

(c) The request to initiate the SIRP must include the appropriate inspection fee.

(d) A requestor who is able to show financial need may submit a request for a reduction or waiver of the required [~~inspection~~] fee.

(1) [~~(c)~~]The request for a reduction or waiver of the required [~~inspection~~] fee must include a sworn affidavit of inability to pay fees on a commission-prescribed form at the time the request to initiate an SIRP is filed.

(2) [~~(d)~~] The Executive Director shall review any request for a fee reduction or waiver and the supporting affidavit to determine whether to approve or deny the request.

(3) [~~(e)~~] The Executive Director's decision on a request for fee reduction or waiver is a final agency decision and is not subject to further administrative appeal.

(e) [~~(g)~~] The Executive Director shall approve a request to reduce or waive the inspection fee if the requestor:

(1) has monthly financial obligations that amount to more than 40% of the requestor's gross monthly income, and;

(2) does not have more than two months of net income in liquid assets.

(f) [~~(h)~~] If the Executive Director approves a request to reduce or waive the inspection fee, the inspection fee shall be reduced or waived based on the following schedule:

(1) 35% of the fee shall be waived if the requestor has monthly financial obligations between 40.00% and 45.00% of the requestor's gross monthly income.

(2) 70% of the fee shall be waived if the requestor has monthly financial obligations between 45.01% and 49.99% of the requestor's gross monthly income.

(3) 100% of the fee shall be waived if the requestor has monthly financial obligations of 50% or more of the requestor's gross monthly income.

(g) [~~(i)~~] The Executive Director may grant exceptions to subsections (e) [~~(g)~~] and (f) [~~(h)~~] of this section upon a written showing of unique need. Any exemption granted by the Executive Director to subsections (e) [~~(g)~~] and (f) [~~(h)~~] of this section must be in writing.

§313.9. Initial Request Review.

(a) Upon receipt of a request to initiate the SIRP, the commission shall review the request for eligibility to determine if the request contains information alleging or otherwise demonstrating:

(1) that the dispute arises from a transaction governed by the Act;

(2) that the request is complete and includes the required attachments and the payment of the appropriate fees;

(3) that the affected home is registered with the commission;

(4) that the alleged construction defect(s) were discovered on or after September 1, 2003;

(5) that the request is timely under §313.4 of this chapter; and

(6) that the request involves a dispute between a homeowner and a builder regarding alleged construction defect(s) giving rise to a claim that is not:

(A) solely for personal injury, survival, wrongful death; or

(B) solely for damage to goods not including damage to the home; or

(C) for an alleged violation of §27.01, Business & Commerce Code, regarding Fraud in Real Estate and Stock Transactions; or

(D) based solely on a builder's wrongful abandonment of an improvement project before completion; or

(E) for an alleged violation of Property Code, Chapter 162, regarding Construction Payments, Loan Receipts, and Misapplication of Trust Funds.

(b) If the commission determines that the request is not complete or that the claim is not eligible for the SIRP, the commission shall notify the requestor in writing and specify the reason(s) the request is not complete or ineligible for the SIRP.

(c) A requestor who has submitted an incomplete request will be provided an opportunity to supplement the request to cure its deficiencies. If a requestor fails to complete a request or to provide supplemental information requested by the commission within ten business days after the commission has made the request, the commission will administratively withdraw the request and refund the fee paid to the requestor.

(d) If the commission determines that the claim is ineligible for the SIRP, the commission will retain copies of all materials submitted, return all originally submitted materials to[~~submitted by~~] the requestor and will refund any paid inspection fee.

§313.11. Appointment of Third-Party Inspector.

(a) No later than fifteen days after the commission has determined that the request to initiate SIRP is complete and that the dispute is eligible for the SIRP, the commission shall identify [~~appoint~~] a third-party inspector for assignment to conduct an inspection and shall notify the requestor and respondent of the identity of the third-party inspector [~~appointment~~] in writing.

(1) Written notification under this subsection will be provided by the most expedient and effective means that is available to both parties, including facsimile or electronic transmission.

(2) The commission, in its sole discretion, shall determine the most expedient and effective means available to both parties for transmission of the written notice of the appointment.

(b) The commission shall identify [~~appoint~~] a qualified third-party inspector from the list of registered third-party inspectors maintained by the commission. The inspector identified [~~appointed~~] shall be the next available inspector on the list of qualified inspectors in the affected home's geographic region.

(c) Each party shall have one opportunity to object to the third-party inspector identified, with or without cause. The objection must be submitted to the commission in writing, by mail, facsimile or electronic transmission within two business days of receipt of notice of the third-party inspector.

(d) Failure to timely notify the commission of a party's objection to the notice of third-party inspector waives the party's right to object, unless the party is able to establish that newly-acquired material information has been found regarding a conflict of interest that could not have reasonably been discovered prior to the expiration of the objection period.

(e) Following receipt of a party's objection, the commission shall identify the next available third-party inspector from the list of registered third-party inspectors, and shall notify the interested parties of the next qualified third-party inspector.

(f) If the commission does not receive a timely written objection to the third-party inspector notice, the commission shall notice the third-party inspector of the SIRP appointment and provide the inspector with the names of the interested parties and their counsel, if any, and a copy of the SIRP request and other information provided by the parties, if it relates to the inspection request.

(g) After receipt of the appointment notice under subsection (f) of this section, the third-party inspector shall advise the commission of a conflict of interest with either of the parties to the dispute or any other reason that the third-party inspector is unable to accept the appointment.

(1) If the third-party inspector advises the commission of a conflict of interest that prevents him from accepting the assignment, the inspector will return the material provided to the commission.

(2) If the third-party inspector appointed is unable to accept the appointment, the commission shall identify another qualified third-party inspector and begin the process, again, as provided in this section.

(3) If a third-party inspector declines an assignment without an explanation that is satisfactory to the Executive Director on more than three occasions, the commission may consider that information when determining whether to continue offering assignments to the inspector and whether to renew the third-party inspector's registration under Chapter 303 of this title.

(h) Until the commission has finally appointed a third-party inspector and the appointed inspector has contacted the parties to determine the date of the inspection, the parties shall not initiate contact with the third-party inspector.

§313.13. Home Inspection and the Third-Party Inspector's Report.

[(a) If the commission does not receive a timely written objection to the appointed third-party inspector, the commission shall contact the third-party inspector with information regarding the dispute, including the names of the interested parties and their counsel, if any. Unless the third-party inspector advises the commission of a conflict of interest with either of the parties to the dispute, the commission shall forward to the appointed third-party inspector a copy of the SIRP request and all documentation submitted with the request.]

(a) [(b)] As soon as practicable but no later than two (2) business days after receipt of the SIRP request, the appointed third-party inspector shall contact the homeowner to ascertain several dates and times that are [arrange a] mutually convenient to conduct an inspection of [time to inspect] the affected home. The third-party inspector shall then make reasonable attempts to contact [notify] the builder on regular business days during regular business hours to determine whether the builder or a representative is available to attend the inspection on one of the identified dates.[and the homeowner of the date and time of the inspection.] If the builder affirms to the inspector that it would like to be present or to send a representative, the third-party inspector shall make reasonable efforts to work cooperatively with the builder and the homeowner to identify a mutually convenient date and time to conduct the inspection. If either party to the dispute fails to work cooperatively with the third-party inspector to arrange a time and date for the inspection, the third-party inspector shall notify the commission.

(b) The homeowner and builder, including any of their consultants or representatives, may be present at the inspection.

(c) The third-party inspector shall gather all information and other data that the third-party inspector, in the inspector's sole professional judgment, deems relevant to conduct the inspection and write the inspection report and shall gather the information [it] by any reasonable means including taking photographs and measurements and interviewing the homeowner, the builder and any consultants present in order to document the inspection of the alleged defects.

(d) A third-party inspector may conduct interviews at a later date or [An interview under this subsection may take place] outside the presence of others not aligned with the party subject to the interview, if the third-party inspector in the inspector's sole discretion deems it preferable for the orderly conduct of the inspection.

(e) [(d)] The third-party inspector may suspend the inspection if a party interferes with the inspection in such a manner as to prohibit the third-party inspector from performing the assigned duties in an impartial and professional manner.

(f) [(e)] The third-party inspector shall not independently engage or employ the services of any testing company or any consultant.

(g) [(f)] Except as otherwise provided under §313.6(a)(9) [§313.6(a)(8)], the builder shall submit to the third-party inspector any documentation or tangible things created or generated as a result of having received a notice of alleged construction defect(s) under §313.2 of this chapter for consideration in the third-party inspector's report to the commission.

(h) Either party may submit any information that the party wants considered by the third-party inspector in preparation of the inspection report to the inspector prior to the inspection or within a reasonable time after the inspection such that the inspector has an opportunity to review the information and timely submit the inspection report to the commission. A party that provides information a third-party inspector shall also provide a copy of the information to the other party to the dispute and to the commission.

(i) If the alleged construction defect(s) described in the request do not include a structural matter, the third-party inspector shall submit a report with recommendations to the commission as soon as practicable after the inspection, but not later than the 12th day after the date the third-party inspector receives the SIRP request and materials submitted by the requestor from the commission, except as otherwise provided by this chapter.

(j) If the alleged construction defect(s) described in the request involve a structural matter:

(1) the third-party inspector shall inspect the home as soon as practicable after receipt of the request from the commission, but not later than the 12th day after the date the third-party inspector receives the request and the requestor's submitted materials from the commission; and

(2) the third-party inspector shall submit a report after the inspection with recommendations to the commission as soon as practicable, but not later than the 45th day after the date the third-party inspector receives the request and materials submitted by the requestor from the commission, except as otherwise provided by this chapter.

(k) The third-party inspector's report shall:

(1) set forth the inspector's findings based on applicable warranty and building and performance standards and shall include the inspector's recommendation for repairs, if any, as to whether each alleged defect is in or out of compliance with the applicable standard;

(2) identify the warranty and building and performance standards upon which each finding is based; and,

(3) include one or more reasonable repair or remediation options to address the alleged construction defect(s) found.

(l) A third-party inspector's report shall not include:

(1) a recommendation for payment of monetary damages;

(2) a price for the recommended repairs;

(3) comments regarding matters outside the scope of the SIRP and outside the scope of the third-party inspector's duties or

(4) a determination of the value of any loss allegedly suffered by the homeowner.

(5) A third-party inspector's report shall not include findings or recommendations for repair for alleged construction defects that are not listed in the SIRP or items that have been excluded by the commission as ineligible for inspection unless both the homeowner and builder agree in writing that the third-party inspector can include an inspection of those items in the report or unless the third-party inspector observes a construction defect that if left uncorrected immediately threatens the health and safety of the occupants.

§313.15. Extension of Time.

(a) [~~A third-party inspector who conducts a structural inspection may request from~~] The [~~the~~] Executive Director may grant an extension of time for a period of no longer than five days for any deadline imposed on the third-party inspector under §313.13 [~~§313.14~~] of this chapter upon the written request of a third-party inspector

(b) [~~A party to a dispute involving a claim related to an alleged structural defect may request an extension of time from~~] The [~~the~~] Executive Director may grant an extension of time for any deadline imposed on the third-party inspector under §313.13 [~~§313.14~~] of this chapter upon receipt of a written request from either party to the SIRP.

(c) The Executive Director shall grant an extension of time requested under subsection (a) of this section upon a showing of that the cause for the delay was not reasonably foreseeable by the third-party inspector when the appointment was accepted [~~made~~].

(d) The Executive Director shall grant an extension under subsection (b) of this section as follows:

(1) for any reasonable period requested [~~a period of no longer than five days~~] without regard to cause if the parties to the dispute agree to the extension in writing; or

(2) for any reasonable period requested under the circumstances upon a showing of good cause by the requesting party [~~if the request is made for an extension of greater than five days~~]; or

(3) [~~upon a showing of good cause by the requesting party~~] if the other party to the dispute does not agree to an extension.

(e) The Executive Director's decision on whether to grant or deny an extension of time requested under this section is a final agency decision not subject to further administrative appeal.

§313.16. [~~Form of~~] Third-party Inspector's Report.

(a) The third-party inspector's report shall be submitted to the commission on the commission's Third-Party Inspection Report Form or in a format substantially similar to the commission's Third-Party Inspection Report Form, so long as the report includes all of the information required by the commission's Third-Party Inspection Report Form [~~a commission-prescribed form~~].

(b) The commission shall return any third-party inspector's report that fails to provide the required information or that includes findings, conclusions, comments or other information outside the scope of the third-party inspector's duties to the assigned third-party inspector for revision.

(c) If a third-party inspector fails to revise a report returned for revision within a reasonable time after notification of the need for revision, the commission may consider that failure in making a determination whether the third-party inspector has fulfilled his duties and is thus eligible for payment and in making a determination as to whether to assign the third-party inspector to future SIRP requests or to renew the third-party inspector's registration under Chapter 303 of this title.

(d) The third-party inspector shall submit his completed report to the commission and the commission shall promptly transmit the completed report, or revised report if required, to the homeowner and the builder.

§313.17. Issues Remanded to the Third-party Inspector [~~Delivery of Inspector's Report~~].

[~~The third-party inspector shall submit his report to the commission and the commission shall promptly transmit the report to the homeowner and the builder.~~]

(a) If the appellate panel remands an issue to the third-party inspector under §313.20 of this chapter, the third-party inspector shall respond to the matter remanded as directed by the appellate panel and file the third-party inspector's report on the remanded matter(s) with the commission within ten business days of receipt of the appellate report.

(b) If a third-party inspector fails to timely file the report on remanded matters, the commission may consider that failure in making a determination whether the third-party inspector has fulfilled his duties and is thus eligible for payment and in making a determination as to whether to assign the third-party inspector to future SIRP requests or to renew the third-party inspector's registration under Chapter 303 of this title.

(c) Within three business days of receipt of the third-party inspector's report filed pursuant to subsection (a) of this section, the Executive Director shall issue the report to the parties.

(d) A report issued on remanded matters is subject to appeal pursuant to the provisions of §313.19 and §313.20 of this chapter.

§313.18. Order forReimbursement of Fees and Costs.

(a) Upon issuance of a final unappealable report in which the [~~If the third-party inspector's~~] findings support all or a portion of the allegations of the requesting party and the requesting party is the homeowner, the Executive Director shall issue an order on behalf of the commission to the builder [~~the commission may order the other party~~] to reimburse [~~all or part of~~] the fees [~~or costs of inspection~~] paid by the requestor and the costs of the inspection paid by the commission.

(b) A builder may appeal a notice of the order to reimburse fees and costs under subsection (a) of this section.

(1) To appeal the notice of order to reimburse fees, the builder must file written notice of its appeal with the commission. The commission will then set the appeal for a hearing with the State Office of Administrative Hearings. The hearing will be conducted pursuant to commission rules. In order to overcome the presumption that the builder must reimburse the commission for the cost of the inspection and fees paid by the requestor, the builder must demonstrate by credible evidence that the builder made a written offer to the homeowner to repair, by the builder or a third-party, all of the finally affirmed construction defects in substantially the same manner as recommended in the commission's final unappealable report, prior to the submission of the SIRP request to the commission, that the homeowner had notice of the offer and that offer was not accepted by the homeowner.

(2) The notice of appeal must be received by the commission within ten calendar days of the date that the commission notices the builder of the obligation to reimburse the fees and costs under subsection (a) of this section.

(3) Notwithstanding a builder's successful appeal of an order to reimburse the commission for inspection fees under subsection (b) of this section, the commission will reimburse the SIRP request fee to any homeowner who initiates a request and pays the appropriate fee under §313.5 of this chapter if the final unappealable report issued by the commission affirms at least one alleged construction defect.

§313.19. Time to Appeal of the Third-party Inspector's Report.

(a) A homeowner or builder may appeal the third-party inspector's report and recommendation(s) on or before the 15th day after the date of the commission's letter issuing the report to the parties [~~receipt of the report~~].

(b) A party to the dispute may request in writing an extension of time to file a notice of appeal of the third-party inspector's report.

(1) Upon a showing of good cause for an extension of time to file a notice of appeal, the Executive Director may extend the dead-

line for a reasonable time under the circumstances [~~by no more than five days~~].

(2) The Executive Director's determination of good cause to grant or deny an extension of time under this subsection is a final agency decision and is not subject to further administrative appeal.

§313.20. Appeal Process.

(a) A [~~If a~~] homeowner or builder may appeal the standards applied to support findings or the reasonableness of the repair [~~appeals the findings or~~] recommendations in a third-party inspector's report. [~~,~~]

(b) Upon receipt of an appeal from either party, the Executive Director shall refer the appeal to a three-person panel of state inspectors. If the request involves a structural matter, one the panel members shall be a licensed professional engineer.

(c) [~~(b)~~] The appellate panel shall conduct a review of the third-party inspector's report and the written documents and tangible things considered by the third-party inspector in making the findings and recommendations, including but not limited to materials submitted with the request, any information or data gathered by the third-party inspector and documentation or tangible things provided to the third-party inspector by one of the parties during the SIRP and prior to the issuance of the report.

(d) Information submitted with the appeal by either party that was not provided to the third-party inspector to be available for his consideration when writing his report will not be provided to or considered by the appellate panel.

(e) [~~(c)~~] The appellate panel shall make written findings of fact and shall recommend approval, rejection or modifications to the findings and recommendations of the third-party inspector or shall recommend that the matter be remanded to the third-party inspector for further action as directed by the appellate panel.

(f) [~~(d)~~] The appellate panel shall file a written report of its findings and recommendations with the Executive Director not later than the 25th day after the notice of appeal is filed with the commission.

(g) [~~(e)~~] The Executive Director shall transmit the appellate panel's rulings to the parties to the appeal not later than the fifth day after receipt of the appellate panel's rulings.

(h) The Executive Director shall return to the appointed third-party inspector for a response any issue remanded by the appellate panel.

(i) [~~(f)~~] A ruling by an appellate panel under this section is a final agency decision not subject to further administrative appeal.

§313.21. Offer to Repair After Issuance of a Final Unappealable Report.

(a) Not later than the 15th day after a SIRP report issued by the commission has become final and unappealable, [~~the commission has transmitted the third-party inspector's report to the parties, or if the third-party inspector's report has been appealed, not later than the 15th date following the date that the appellate panel's ruling has been transmitted to the parties~~], a builder may make a written offer of settlement to the homeowner to repair the alleged construction defect(s).

(b) The offer must be sent by certified mail, return receipt requested, to the homeowner at the homeowner's last known address or the homeowner's attorney, if the homeowner is represented by counsel.

(c) The offer may include either an agreement by the builder to repair or to have repaired by an independent contractor, partially or totally at the builder's expense, or at a reduced rate to the homeowner, any construction defect(s) included in the SIRP request.

(d) The offer shall include in reasonable detail the repairs to be made and shall provide that the repairs will be made within forty-five days after the date the builder receives written notice of the homeowner's acceptance of the offer, except as delayed by the homeowner or by the occurrence of events beyond the builder's control.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600910
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-2886

10 TAC §313.12, §313.14

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Residential Construction Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Texas Residential Construction Commission (commission) proposes the repeal of §313.12, Objection to the Third-Party Inspector Appointed, and §313.14, The Third-Party Inspector's Report, because those provisions have been subsumed into the proposed amendments to §313.13 and §313.15, published contemporaneously in another section of this edition.

Ms. Susan Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed repeals are in effect there will be no increase in expenditures or revenue for state government and no fiscal impact for state or local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for the first five years the rules are repealed the public will benefit from more clear and precise rules that explain how to participate in the SIRP process. There will not be an effect on individuals, or large, small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

Ms. Durso has also determined that for each year of the first five-year period the proposed repeals are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Comments on the proposed repeals may be submitted to Susan K. Durso, General Counsel, Texas Residential Construction Commission, 311 E. 14th Street, Austin, Texas 78701 or by fax to (512) 475-2453. Comments may also be submitted electronically to susan.durso@trcc.state.tx.us. For comments submitted electronically, please include "Repealed SIRP Rules" in the subject line. The deadline for submission of comments is thirty (30) days from the date of publication of the proposed rules in the *Texas Register*. Comments should be organized in a manner consistent with the organization of the rule under consideration.

The repeals are proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16 and Subtitle D of Title 16 of the Property Code, which provides for the implementation of the SIRP and Property Code §§27.001 - 27.004 to the extent that those sections relate to Title 16 Subtitle D of the Property Code.

The repeals are proposed to implement Property Code §408.001 and §426.004.

§313.12. Objection to the Third-Party Inspector Appointed.

§313.14. The Third-Party Inspector's Report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600911
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-2886

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.41

The Public Utility Commission of Texas (commission) proposes an amendment to §25.41, relating to Price to Beat. The proposed amendment will address the time frame leading up to and after the end of the Price to Beat period on January 1, 2007. The amendment will also classify Price to Beat customers as former PTB customers at the expiration of the Price to Beat period. This rule is a competition rule subject to judicial review as specified in PURA §§39.001(e) and (f). Project Number 31416 is assigned to this proceeding.

When commenting on specific subsections of the proposed rule, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is interested in receiving only "leading edge" examples which are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

Matthew Troxle, Director of the Retail Market Oversight Section, Electric Industry Oversight Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Troxle has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the amended section will be that the terms and conditions governing how Price to Beat customers are to be treated upon the expiration of the Price to Beat will be clear and unambiguous. In addition, the rate for Price to Beat customers at the end of the Price to Beat Period will be more reflective of a market based rate. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Troxle has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, April 7, 2006, at 8:00 a.m. The request for a public hearing must be received within 21 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 21 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 31 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31416 - PTB.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, §39.001(a) which requires the commission to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry, §39.102(b) which allows the affiliated retail electric provider to continue to serve a retail electric customer until the customer chooses service from another provider, §39.101(b) which entitles a customer to choose its retail electric provider, and §39.202, relating to the Price to Beat.

Cross Reference to Statutes: Public Utility Regulatory Act §39.202.

§25.41. Price to Beat.

(a) - (b) (No change.)

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) - (2) (No change.)

(3) Former PTB Customer--A customer who was served under a price to beat Terms of Service document on the day preceding the expiration of the price to beat period, including any customer who had previously been served at the price to beat and has not made an affirmative choice of a different service plan.

(4) [~~(3)~~] Headroom--The difference between the average price to beat (in cents per kilowatt hour (kWh)) and the sum of the average non-bypassable charges or credits approved by the commission in a proceeding pursuant to PURA §39.201, or PURA Subchapter G (in cents per kWh) and the representative power price (in cents per kWh). Headroom may be a positive or negative number. A separate headroom number shall be calculated for the typical residential customer and the typical small commercial customer. The calculation for the typical residential customer shall assume 1,000 kWh per month in usage. The calculation of the typical small commercial customer shall assume 35 kilowatts (kW) of demand and 15,000 kWh per month in usage.

(5) [~~(4)~~] Nonaffiliated REP--Any competitive retailer conducting business in a transmission and distribution utility's (TDU's) certificated service territory that is not affiliated with that TDU unless the competitive retailer is a successor in interest to a retail electric provider affiliated with that TDU.

(6) [~~(5)~~] Peak demand--The highest 15-minute or 30-minute demand recorded during a 12-month period.

(7) [~~(6)~~] Price to beat period--The price to beat period shall be from January 1, 2002 to January 1, 2007. In a power region outside the Electric Reliability Council of Texas (ERCOT) if customer choice is introduced before the date the commission certifies the power region pursuant to PURA §39.152(a) are met, the price to beat period continues, unless changed by the commission in accordance with PURA Chapter 39, until the later of 60 months after the date customer choice is introduced in the power region or the date the commission certifies the power region as a qualified power region.

(8) [~~(7)~~] Provider of last resort (POLR)--As defined in §25.43 of this title (relating to Provider of Last Resort).

(9) [~~(8)~~] Registration agent--As defined in §25.454 of this title (relating to Rate Reduction Programs).

(10) [~~(9)~~] Representative power price--The simple average of the results of:

(A) a request for proposals (RFP) for full-requirements service of 10% of price to beat load for a duration of three years expressed in cents per kWh; and

(B) the price resulting from the capacity auctions of the affiliated power generation company (PGC) required by §25.381 of this title (relating to Capacity Auctions) for baseload capacity entitlements auctioned in the ERCOT zone where the majority of price to beat customers reside, expressed in cents per kWh. The calculation of the price resulting from the capacity auctions shall assume dispatch of 100% of the entitlement and shall use the most recent auction of a 12-month forward strip of entitlements, or the most recent aggregated forward 12 months of entitlements. The affiliated REP, at its option, may conduct an RFP or purchase auction for an amount equivalent to the amount, in MWs, of the affiliated PGC's capacity auction for the September 2001 12-month forward strip baseload entitlements.

(11) [~~(10)~~] Residential customer--Retail customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of classification under a residential rate class, those retail customers that are primarily end users consuming electricity for personal, family or household purposes and who are not resellers of electricity.

(12) [~~(11)~~] Small commercial customer--A non-residential retail customer having a peak demand of 1,000 kilowatts (kW) or less. For purposes of this section, the term small commercial customer refers to a metered point of delivery. Additionally, any non-residential, non-metered point of delivery with peak demand of less than 1,000 kW shall also be considered a small commercial customer. For purposes of subsection (i) of this section, unmetered guard and security lights are not considered small commercial customers unless such an account has historically been treated as a separate customer for billing purposes.

(13) [~~(12)~~] Transmission and distribution utility--As defined in §25.5 of this title (relating to Definitions), except for purposes of this section, this term does not include a river authority.

(d) Price to beat offer.

(1) - (2) (No change.)

(3) An affiliated REP may not change the Terms of Service document of a price to beat customer to be less advantageous to the customer until the expiration of the price to beat period.

(e) - (l) (No change.)

(m) Expiration of the price to beat period. The following paragraphs define the treatment of former PTB customers after the expiration of the price to beat period and during the 180 days prior to the expiration of the price to beat period.

(1) For the 180 days prior to the expiration of the price to beat period, the affiliated REP shall include a bill insert in each bill to price to beat customers, in a format developed by and approved by the commission.

(2) 45 days prior to the expiration of the price to beat period, the affiliated REP will mail a copy of the price to beat Terms of Service document to price to beat customers. This document will make no changes from the version of the Terms of Service document that the price to beat customer is currently taking service under.

(3) The affiliated REP shall provide to REPs and aggregators, at least 120 days before the expiration of the price to beat period, a mass customer list of customers served by the affiliated REP at price to beat rates. The mass customer list shall contain the information that the registration agent is authorized to release under §25.472 of this title (relating to Privacy of Customer Information). The affiliated REP shall not be required to comply with the provisions of §25.472(a)(2) of this title prior to releasing its list of price to beat customers.

(4) Upon the expiration of the price to beat period, former PTB customers will be served according to the price to beat Terms of Service document that was mailed to the customer pursuant to subsection (m)(2) of this section.

(5) Former PTB customers will continue to be served under the price to beat Terms of Service document until the affiliated REP complies with the requirements of §25.475(e)(1) of this title (relating to Information Disclosures to Residential and Small Commercial Customers). A notice of changes in terms and conditions of service shall not be issued before the expiration of the price to beat period.

(6) Any notice of changes in terms and conditions of service shall not automatically move a former PTB customer onto a long-term contract (more than month-to-month service) without an affirmative decision by the former PTB customer to be placed upon the long-term contract.

(7) Former PTB customers shall not be transferred to POLR or disconnected, except pursuant to Subchapter R (Customer Protection Rules for Retail Electric Service) of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601023
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 936-7223

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16 TAC §25.43

The Public Utility Commission of Texas (commission) proposes an amendment to §25.43, relating to Provider of Last Resort (POLR). The proposed amendment will modify the structure and the mechanics of Provider of Last Resort service to take into account changed circumstances in the competitive market, the end of the Price to Beat period on January 1, 2007, and to reflect the experience gained from prior Provider of Last Resort service. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 31416 is assigned to this proceeding.

Matthew Troxle, Director of the Retail Market Oversight Section, Electric Industry Oversight Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Troxle has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the amended section will be that electricity prices for customers receiving service from the Provider of Last Resort will better reflect the cost to provide the service. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Troxle has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, April 7, 2006, at 8:00 a.m. The request for a public hearing must be received within 21 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 21 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 31 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31416 - POLR. The commission will also accept comments on the following questions:

1. In regard to the proposed POLR rate, what is the appropriate "MCPE multiplier" to be applied as the "X%" in the POLR rate formula?

2. In regard to the proposed POLR rate, what are the appropriate monthly customer charges or demand charges?

3. In regard to the proposed POLR rate, how far in advance of billing does the rate need to be calculated? Does a customer who is to be transitioned to POLR need to know the rate at that time or is it appropriate for the rate to be calculated after service is rendered, but before a bill is issued?

4. In regard to the small non-residential greater than or equal to 50 kW customer class, what are the appropriate customer protection rules to be waived?

5. In regard to the eligibility criteria to serve as a POLR, are the proposed 1% threshold values too low (or too high)?

6. In regard to the eligibility criteria to serve as a POLR, what should be the minimum financial qualifications that a REP must demonstrate to the Commission?

7. Should customers who are served by a POLR provider because their chosen REP is no longer serving them be able to request an out of cycle meter read without being charged the applicable transmission and distribution utility discretionary charge for the service? If so, what is the appropriate cost recovery methodology that should be used to compensate the transmission and distribution utility for performing the service?

8. Is the selection methodology appropriate for volunteer POLR REPs and, if not, how should it be modified to encourage REP participation?

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §39.202.

§25.43. Provider of Last Resort (POLR).

(a) Purpose. The purpose of this section is to ensure that, as mandated by the Public Utility Regulatory Act (PURA) §39.106:

(1) A basic, standard retail service package will be offered by a POLR <u>or multiple POLRs</u> at a fixed, non-discountable rate to any requesting customer in all of the Texas transmission and distribution utilities' (TDU's) service areas that are open to competition; and

(2) (No change.)

(b) Application<u>; termination of service for non-payment</u>.

(1) (No change.)

(2) <u>Until the expiration of the price to beat period,</u> POLR service for a residential or small non-residential customer of a competitive REP whose electric service is terminated for non-payment under the provisions of §25.482 of this title (relating to Termination of Contract) shall be provided by the affiliated REP for that POLR area. In

the case of the territory encompassed by Sharyland Utilities, LP, the affiliated REP shall be deemed to be First Choice Power, Inc.[~~, the entity providing default service in that area.~~] The provisions of this section do not apply to any affiliated REP serving non-paying residential and small non-residential customers of competitive REPs except as otherwise specifically stated herein. Upon the expiration of the price to beat period, a customer whose electric service is terminated for non- payment under the provisions of §25.482 of this title shall be provided by the volunteer POLR REPs first and the non-volunteering POLR providers second.

(3) POLR service is intended to provide continuity of service. The POLR rate must reflect the inherent level of risk associated with POLR service. POLR service is envisioned as a temporary service and the POLR rate is not intended to be a competitive offering, but a cost and risk based offering. [~~As of September 24, 2002, a non-paying residential or small non-residential customer of an affiliated REP shall not be transferred to the POLR selected under this section.~~]

[~~(4) A large non-residential customer whose service is terminated for non-payment shall not be transferred to the POLR after September 24, 2002. Notwithstanding the foregoing, a non-paying large non-residential customer may be transferred to the POLR if that customer is receiving service under a contract entered into prior to September 24, 2002, the original term of which has not expired at the time transfer to POLR is requested, and if the contract makes no provision for waiver of the customer's right to be transferred to the POLR for non-payment.~~]

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

(1) - (4) (No change.)

[~~(5) Load ratio--The amount of load for a particular customer class served by a REP on a nationwide basis in comparison to the amount of load for that class in areas in Texas where customer choice is in effect. This determination is to be made by dividing the REP's nationwide total megawatt-hour sales to the customer class during the prior year by the total megawatt-hour sales to such class in areas in Texas where customer choice was in effect during any portion of the prior year.~~]

(5) [~~(6)~~] Non-discountable rate--A rate that does not allow for any deviation from the price offered to all customers within a class, except as provided in §25.454 of this title (relating to Rate Reduction Program).

(6) [~~(7)~~] POLR area--The service area of a TDU in an area where customer choice is in effect, except that the POLR area for AEP-Texas Central [~~Central Power and Light~~] Company shall be deemed to include the area served by Sharyland Utilities, L.P.

(7) [~~(8)~~] Provider of last resort (POLR)--A REP certified in Texas that has been designated by the commission to provide a basic, standard retail service package in accordance with this section to customers that are not being served by a REP for reasons other than non-payment. There may be multiple POLR providers in a TDU service area.

(8) [~~(9)~~] Residential customer--Retail customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of classification under a residential rate class, those retail customers that are primarily end users consuming electricity for personal, family, or household purposes and who are not resellers of electricity. [~~A residential customer as defined in §25.41 of this title (relating to the Price to Beat).~~]

(9) [~~(10)~~] Small non-residential customer less than 50 kilowatts (kW)--A non-residential retail customer having a peak demand of less than 50 kW. [~~A small commercial customer as defined in §25.41 of this title.~~]

(10) Small non-residential customer greater than or equal to 50 kW--A non- residential retail customer having a peak demand of 50 kW, but less than 1,000 kW.

(d) POLR service.

(1) For the purpose of POLR service, there will be four [~~three~~] classes of customers: residential, small non-residential less than 50 kW, small non-residential greater than or equal to 50 kW, and large non-residential.

(2) The POLRs [~~POLR~~] may be designated to serve any or all of the four [~~three~~]customer classes in a POLR area. Within the customer class it is designated to serve, the POLRs [~~POLR~~] shall provide service to the following customers:

(A) - (B) (No change.)

(3) The POLRs [~~POLR~~] shall offer a basic, standard retail service package, which will be limited to:

(A) - (E) (No change.)

(4) The POLRs [~~POLR~~] shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide billing and collection duties for REPs who have defaulted on payments to the servicer of transition bonds or to TDUs.

(e) Standards of service.

(1) (No change.)

(2) A POLR shall serve any customer according to the Standard Terms of Service in subsection (f)(1) of this section for any customer's respective customer class as described in subsection (d)(2) of this section, except that volunteer POLR REPs may charge a rate less than the POLR rate.

(3) [~~(2)~~] A POLR shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter. In addition, the POLR shall be held to the following general standards:

(A) The POLRs [~~POLR~~] shall inform any customer transferred to it, that the POLR [~~it~~] is now providing service to the customer and shall disclose all charges for which the customer will be responsible;

(B) The non-volunteer POLRs [~~POLR~~] shall provide a commission-maintained list of certified REPs to every [~~any~~] customer [~~who inquires about selecting a provider~~]; and,

(C) The POLRs [~~POLR~~] may not require that a customer sign up for a minimum term as a condition of service, except that if the POLR offers a level or average payment plan in accordance with Subchapter R of this chapter, a residential or small non-residential customer who elects to receive service under such plan may be required to sign up for a minimum term of no more than six months.

(D) The POLRs shall inform customers that the customer may accelerate a switch to another REP by requesting a "special or out-of-cycle meter read" and paying the applicable transmission and distribution utility charge for the meter read.

(f) Customer information.

(1) [~~Forms.~~] The standard terms of service prescribed [~~forms~~] in subparagraphs [~~subparagraph~~] (A) - (C) of this paragraph

are effective for all POLR service [~~rendered after December 31, 2002~~]. These forms may [~~only~~] be changed through the rulemaking process and are available in the commission's Central Records Division and on the commission's website at www.puc.state.tx.us.

(A) Standard Terms of Service [~~Agreement~~], Provider of Last Resort (POLR) Residential Service:
Figure: 16 TAC §25.43(f)(1)(A)

(B) Standard Terms of Service [~~Agreement~~], Provider of Last Resort (POLR) Small Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(B)

(C) Standard Terms of Service [~~Agreement~~], Provider of Last Resort (POLR) Large Non-Residential Service:
Figure: 16 TAC §25.43(f)(1)(C)

(2) [~~Provision of information to customers.~~] The POLRs [~~POLR~~] shall provide each new customer the standard terms of service [~~agreement~~] applicable to the specific customer. Such standard terms of service [~~agreements~~] shall be updated as required under §25.475(d) of this title (relating to Information Disclosures to Residential and Small Commercial Customers.)

(g) General description of POLR selection process.

(1) All REPs shall provide information to the commission in accordance with subsection (h)(1) of this section. Based on this information, the commission's designated representative [~~POLR selected for areas where customer choice is in effect. The commission~~] shall designate [~~certified~~] REPs that are eligible to serve as POLRs in areas of the State in which customer choice is in effect, except that the commission shall not designate POLRs [~~the POLR~~] in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated its POLR designation authority to the commission in accordance with subsection (p) of this section.

(2) [~~Process.~~] The commission will select REPs that will provide [~~solicit bids for~~]POLR service for two-year terms as specified in paragraph (3) of this subsection. The [~~Bids shall be solicited from REPs that are eligible to provide POLR service under the provisions of subsection (h) of this section. The process for evaluating such bids is specified in subsection (i) of this section and the basis upon which bids shall be compared is specified in subsection (k)(3) of this section. If no eligible bids for a POLR customer class in a POLR area are submitted, the POLR shall be selected by lottery under the procedures set forth in subsection (j) of this section and the~~] POLR rate shall be established under the provisions of subsection (k) of this section.

(3) [~~Term.~~] POLRs shall serve two-year terms beginning in January of each odd-numbered year. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule shall be set at the time POLRs are initially selected in such areas.

(h) REP eligibility to serve as POLR. In each even-numbered year, the commission shall determine the eligibility of certified REPs to serve as a POLR for the terms scheduled to commence in January of the next year.

(1) All REPs shall [~~Information requirements. The commission may require a REP and its affiliates to~~] provide information to the commission necessary to establish their [~~that REP's~~] eligibility to serve as POLR. All REPs shall file, by July 10th, of each even numbered year, by service area, information on the classes of customers they provide service to, and the number of customers they serve. They shall also provide information on their capabilities to provide service to additional customers, their financial condition, and whether they are interested in providing POLR service as a volunteer POLR REP, and, if so, the customer classes and areas where they are interested in providing the service. Specific information received from a REP under this subsection [~~that is responsive to such a request by the commission~~]shall be treated confidentially if it is submitted to the commission in accordance with the provisions of §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). However, the commission's determination regarding eligibility of a REP to serve as POLR under the provisions of this section shall not be considered confidential information.

(2) Eligibility to be designated as a POLR is specific to POLR area and customer class. [~~Criteria. During the term of the price to beat for a particular customer class, an affiliated REP is ineligible to serve as POLR for that class in the POLR area defined by the boundaries of its affiliated TDU, unless the affiliated REP submits a bid to provide POLR service in the POLR area defined by the boundaries of its affiliated TDU at the price to beat.~~] A REP is [~~also~~] ineligible to provide POLR service to a particular customer class in a POLR area if:

(A) A proceeding to revoke or suspend the REP's certificate is pending at the commission, the [~~or that~~] REP's certificate has been suspended or revoked by the commission, or the REP's certificate is deemed suspended pursuant to §25.107(i) of this title (relating to Certification of REPs);

(B) The REP's total meters served for the particular class is less than 1.0% of the total meters in the TDU service area for that customer class [~~The REP's load ratio for the particular class is less than 1.0%~~];

(C) The REP total customers served for the particular class is less than 1.0% of the total customers in the POLR area for that customer class;

(D) [~~(C)~~] The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the POLR term;

(E) [~~(D)~~] On the [~~expected~~] date of the commencement of the POLR term [~~bid submittal~~], the REP or its predecessor, including a REP that has assumed the responsibilities of another REP, will not have served customers in Texas for at least 18 months;

(F) [~~(E)~~] The REP is not certificated to serve or does not serve the applicable customer class, or does not have an agreement with the service area TDU [~~in Texas~~];

(G) [~~(F)~~] The REP's customers are limited to its own affiliates; [~~or~~]

(H) A REP that files an affidavit stating that it does not serve customers subject to the customer protection rules, and should therefore be considered ineligible to provide POLR service, may opt-out of eligibility for the small non-residential less than 50 kW customer class;

(I) A REP files an affidavit stating that it does not serve small non-residential customers in either class, except for the low-usage sites of the REP's large non-residential customers, or commonly owned or franchised affiliates of the REP's large non-residential customers, and should therefore be considered ineligible to provide POLR service, may opt-out of eligibility for either of the small non-residential customer classes; or,

(J) The REP does not meet certain minimum financial qualifications as determined by the commission.

[~~(G) The REP is certified only to provide POLR service for an affiliate.~~]

(3) [~~Publication of notice of eligibility.~~] For each POLR term scheduled to commence in January of the next year, [~~except for the year 2003,~~] the commission shall publish the names of all of the REPs eligible to provide POLR service for each customer class in each POLR area. A REP may challenge its eligibility determination within five business days of the notice of eligibility only by submitting to commission staff additional documentation showing that the data upon which its initial eligibility determination was made is incorrect and that the errors resulted in an incorrect eligibility status. commission staff shall verify the additional documentation and, if accurate, recalculate the REP's eligibility. Commission staff will notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the volunteer POLR list or the selection of the POLR providers. [~~The notice shall be published in the *Texas Register* prior to or contemporaneously with publication of the invitation for bids. For 2003, only affiliated REPs shall be considered eligible REPs.~~]

(4) A REP that is serving as a POLR provider in accordance with this section shall submit reports not later than March 1 and September 1 of each year providing the information specified in paragraph (2) of this subsection.

(i) Volunteer POLR REP list. Based on the information provided in accordance with this subsection and subsection (h) of this section, the commission shall post on its webpage the REPs that are willing to serve as POLR on a volunteer basis. REPs may submit an indication of their willingness to voluntarily serve as POLR no earlier than June 1 and no later than July 31 of each even-numbered year. The order in which customers shall be transferred to the volunteer POLR REPs shall be inverse order of market share as it exists when the volunteer POLR REP list is created, meaning the REP with the smallest market share at the time the volunteer POLR REP list is created, shall be first on the volunteer POLR REP list. [~~Bid process. Initially, a competitive bid process will be used to select the POLR for each customer class in each designated POLR area.~~]

(1) A volunteering POLR REP shall provide to the commission the name of the REP, the appropriate contact person with current contact information, which customer classes the REP is willing to serve within each POLR area, and the estimated amount of load the REP is willing to serve by customer class and POLR area. [~~Invitation to bid. Before the expiration of a term of POLR service in a POLR area, the commission shall issue an invitation for bids for POLR service for each customer class in the POLR area. Notice of the bid invitation, any submission requirements, the submission deadline, and the project number assigned to the bid process for that POLR area shall be published in the Texas Register. A separate project number shall be designated for each POLR area.~~]

(2) [~~Bidder qualifications.~~] A REP that has met the eligibility requirements of subsection (h) of this section shall be eligible for the volunteer POLR REP list [~~considered a qualified bidder~~].

(3) A volunteer POLR REP shall not charge its POLR customers a rate higher than the POLR rate for POLR service. A volunteer REP may market to its POLR customers rates lower than the POLR rate. The volunteer POLR REP, in any marketing to the POLR customer, shall make it clear that the customer has the right to switch to a different REP or take service from the volunteer POLR REP under a rate other than the rate set out in the standard terms of service, if the POLR offers such a rate. A customer may agree to a long-term contract with the POLR REP, but the POLR REP shall not represent to the customer that agreeing to a long-term contract is the only option to avoid the POLR rate. [~~Submission of bids.~~]

[~~(A) Separate bids required. A bidder may submit a bid to serve any of the three customer classes in a POLR area. Bids for each customer class in a POLR area shall be submitted separately. A REP may submit a separate bid for POLR service for each customer class and POLR area for which it seeks to provide service.~~]

[~~(B) Filing and content. Each bid shall be filed in the appropriate project number on or before the date and time specified in the bid invitation; identify only one POLR area; specify only one customer class; include a bid in conformance with the rate structure for the class; and not contain any information that will be considered, after the closing date for submission of all bids, to be confidential or proprietary by the filing party.~~]

[~~(C) Designation of preference. A REP whose load ratio for a particular class is less than 5.0% that submits more than one bid for POLR service for that class may include in its bid a statement indicating its order of preference in POLR areas.~~]

(4) Upon the transition of customers to the POLRs, ERCOT shall use the volunteer REP list to assign customers to the volunteer POLR REPs in a non-discriminatory fashion, before assigning customers to the non-volunteering POLR providers. Customers shall be assigned to the volunteer POLR REPs in the order that they appear on the volunteer POLR list, and the volunteer POLR REP shall not be assigned more load than it has indicated that it is willing to serve. A sequential electronic service identifier (ESI ID) methodology or other non- discriminatory methodology shall be employed to ensure non-discriminatory assignment of customers to the volunteer POLR REPs. [~~Filing under seal. Prior to the closing date specified in the bid invitation, bids must be filed under seal for the limited purpose of ensuring the confidentiality of the bids submitted.~~]

(5) A volunteer POLR REP may file a request to be removed from the volunteer POLR REP list or to modify the estimated amount of load it is willing to serve at any time, and such a request shall be effective 30 days after the request is filed with the commission. [~~Bid opening and public comment.~~]

[~~(A) All bids filed under seal shall be opened and filed publicly by commission staff in the applicable project number by 5:00 p.m. on the third business day following the submission date identified in the bid invitation.~~]

[~~(B) If the bid opening is cancelled, the bids filed under seal will be returned unopened to the bidders.~~]

[~~(C) Interested persons may submit comments on bids in the applicable project up to the 10th calendar day after the bid submission deadline specified in the bid invitation. Interested persons may submit reply comments on bids up to the 15th calendar day after the submission deadline specified in the invitation. All comments and reply comments shall be filed in the applicable project.~~]

[~~(6) Evaluation of bids.~~]

[~~(A) Bids that have been rejected pursuant to subparagraph (B) of this paragraph shall not be evaluated. The bids received for each customer class in each POLR area shall be evaluated on the basis of price in accordance with the provisions of subsection (k)(3) of this section. If two or more bidders bid the same lowest price, the lowest bidder shall be determined by lottery in accordance with the provisions of subsection (j) of this section, with the pool of lottery candidates limited to the bidders submitting tie bids. If, with respect to a particular class of customers, a bidder described in paragraph (3)(C) of this subsection submits the lowest bid for that class of customers in two or more POLR areas, staff shall determine that the bidder submitted the lowest price in the POLR area according to the preference statement submitted by the bidder with its bids. If the bidder did not~~

state a preference or the preferences stated are irreconcilable, the bidder shall be deemed to prefer to serve in the POLR area to which the lowest project number has been assigned.]

[(B) The commission shall reject a bid for any of the following reasons:]

[(i) The bidder is not qualified.]

[(ii) The bid was received by the commission after the date and time specified in the bid invitation.]

[(iii) The bid did not conform to a requirement described in the bid invitation.]

[(iv) The rate structure submitted in the bid deviated from the rate structure applicable to the customer class or the bid price exceeds the maximum level specified in subsection (k)(3) of this section.]

[(v) The bidder asserts to the commission that the bid contains information considered, after the closing date for submission of all bids, to be confidential or proprietary.]

[(vi) In the event a bidder described in paragraph (3)(C) of this subsection submits two or more bids for the same customer class in different POLR areas then all bids from that bidder for that customer class, other than the preferred bid, shall be rejected.]

[(7) Report to the commission. Staff shall report on the bid process for each POLR area to the commission. The report shall identify the POLR customer classes and POLR areas for which no bids were submitted. The report shall also identify all rejected bids and state the reason why each bid was rejected, describe conforming bids, and summarize the comments and reply comments received. For each customer class in each POLR area, the report shall include a recommendation by staff that POLR service be awarded to the bidder that offered the lowest price in a conforming bid or that the POLR for a given customer class and POLR area should be selected by lottery because no eligible bids were received.]

[(8) Commission action. For a particular POLR class and POLR area, the commission shall either award a bid consistent with the provisions of this section or reject all bids and direct that the POLR for that customer class and POLR area be determined by lottery.]

(j) Non-volunteering POLR providers [Lottery]. The provisions of this subsection shall govern the manner in which the non-volunteering POLRs [a lottery to select a POLR] for a given POLR area and customer class are [is] selected [conducted].

(1) The REPs eligible to serve as POLRs shall be as determined based on the information provided by REPs in accordance with subsection (h) of this section. [Lottery candidacy. The commission shall designate a pool of lottery candidates for each customer class in each POLR service area. Every REP eligible to serve as a POLR is a candidate for the lottery unless:]

[(A) By virtue of having successfully bid for POLR service, the REP will be serving as POLR for that customer class in two or more service areas in January of the next year; or]

[(B) The REP's load ratio for the customer class is less than 5.0% and the REP will be serving as POLR for the customer class in another area during the upcoming POLR term]

(2) In each POLR area, for each POLR customer class there shall be five non-volunteering POLR providers. The non-volunteering POLR providers shall be the five eligible REPs that have the greatest market share of customer load by customer class within the POLR area. The commission shall designate the non-volunteering POLR providers by October of the year preceding the POLR term, based upon the data the commission has at the time of the determination. [Elimination from lottery pool. A REP otherwise eligible for the lottery pool that will be serving a particular customer class as POLR during the upcoming term in the POLR area defined by the boundaries of CenterPoint Energy Houston Electric shall be eliminated from the lottery pool for that class for the POLR area defined by the boundaries of the Oncor Electric Delivery Company. Similarly, a REP otherwise eligible for the lottery pool that will be serving a particular customer class as POLR during the upcoming term in the POLR area defined by the boundaries of the Oncor Electric Delivery Company shall be eliminated from the lottery pool for that class for the POLR area defined by the boundaries of CenterPoint Energy Houston Electric.]

(3) In the event of a transition of customers to POLR service, customers shall be allocated to the non-volunteering POLR providers only after the volunteer POLR REP list has been exhausted. The customers to be transitioned to the non-volunteering POLR providers shall be allocated to the non-volunteering POLR providers in a non-discriminatory fashion, in accordance with the percentage of market share of customer load, as determined in paragraph (2) of this subsection, by POLR area and customer class. If a REP that is designated as a non-volunteering POLR provider also volunteers as a volunteer POLR REP, the amount of load allocated to the REP on a non-volunteer basis shall be reduced by the amount of load served by the REP on a volunteer POLR REP basis. A sequential ESI ID methodology or other non-discriminatory methodology shall be employed to ensure non-discriminatory assignment of customers to the non-volunteering POLR providers. [Drawing. At a time and date noticed by the commission in the Texas Register, a separate drawing will be held for each customer class in each POLR area for which a POLR was not selected by bid. The drawings shall be held in the order of the project numbers assigned to the POLR service areas and interested persons may attend. The names of the lottery candidates shall be written on separate pieces of paper of identical size and color. A staff member shall place the names of the lottery candidates in a receptacle. A commission representative shall draw a piece of paper from the receptacle. The REP whose name is written on the piece of paper shall serve as the POLR for that customer class in that POLR area at the rate specified in subsection (k)(4) of this section.]

(k) POLR rate.

(1) The provisions of this paragraph establish the maximum POLR rate of volunteer POLRs and the POLR rate for non-volunteering POLRs. [Components of POLR rate when service awarded by bid. The provisions of this paragraph apply to the POLR rate when POLR service is awarded by bid. The POLR rate for the residential and small non-residential customer classes shall be either the price to beat or a rate consisting of non-bypassable charges, a monthly customer charge that does not change during the term of the POLR, an energy charge, and, for small and large non-residential customers, a demand charge. For residential and small non-residential customers, the applicable standard price to beat rate shall be a floor on the POLR rate and the POLR rate may not fall below the PTB. For large non- residential customers, the POLR rate for large non-residential customers shall consist of non- bypassable charges, a monthly customer charge that does not change during the term of the POLR, an energy charge, and a demand charge.]

(A) The POLR rate for the residential customer class shall be determined by the following formula: POLR rate (in cents/kWh) = (X% * Zonal Average Monthly MCPE Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand charge) + (TDSP Charges); Where the "Zonal Average Monthly MCPE shaped by ERCOT Load Profile" is

a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:
Figure: 16 TAC §25.43(k)(1)(A)

(B) The POLR rate for the small non-residential customer classes shall be determined by the following formula: POLR rate (in cents/kWh) = (X% * Zonal 30-Day Average MCPE Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand Charge) + (TDSP Charges); Where the "Zonal 30-Day Average MCPE Shaped by ERCOT Load Profile" is a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:
Figure: 16 TAC §25.43(k)(1)(B)

(C) The POLR rate for the large non-residential customer class shall be determined by the following formula: POLR rate (in cents/kWh) = (X% * MCPE Shaped by ERCOT Load Profile for Time Customer was Served Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand Charge) + (TDSP Charges); Where the "MCPE Shaped by ERCOT Load Profile for Time Customer was Served Shaped by ERCOT Load Profile" is a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:
Figure: 16 TAC §25.43(k)(1)(C)

(2) If in response to a complaint or upon its own investigation, the commission determines that a POLR failed to charge the appropriate POLR rate, and as a result overcharged its customers, the POLR shall issue refunds to the specific customers who were overcharged. [Elements of a bid.]

[(A) Residential customer class. Each bid for POLR service for the residential customer class shall be either a bid to serve customers at the price to beat or a bid that includes:]

[(i) A monthly customer charge that shall not change during the POLR term and that customer charge may be zero dollars; and]

[(ii) An energy charge subject to adjustment under the provisions of subsection (l) of this section, expressed as cents per kilowatt-hour (kWh). The energy charge may be differentiated into peak months (May through October) and off-peak months (November through April).]

[(B) Small non-residential customer class. Each bid for POLR service for the small non- residential class shall be either a bid to serve customers at the price to beat or shall include the components for bids for the residential customer class as set forth in subparagraph (A) of this paragraph and a demand charge that may be zero dollars.]

[(C) Large non-residential customer class. Each bid for POLR service for the large non- residential customer class shall include:]

[(i) A monthly customer charge that shall not change during the POLR term and that customer charge may be zero dollars;]

[(ii) A demand charge that may be zero dollars; and]

[(iii) The percent over the energy reference price specified by the commission that the bidder will charge for energy. For POLR areas in the Electric Reliability Council of Texas (ERCOT), the energy reference price shall be the market clearing price for energy (MCPE) determined on the basis of 15-minute intervals. For POLR areas outside of ERCOT, the commission shall specify the energy reference price prior to the inception of retail customer choice.]

[(3) Comparison and rejection of bids. Bids for POLR service for residential and small non- residential service shall be compared on the basis of price as specified in this paragraph.]

[(A) Residential customer class. Bids for POLR service for residential customers shall be compared assuming monthly residential energy usage of 1000 kWh. If a bid for POLR service for this average usage level exceeds 125% of the applicable standard residential price to beat rate for that usage level at the time bids are submitted, the bid shall be rejected. For purposes of this rule, the standard residential price to beat rate for residential service in each POLR area shall refer to the following price to beat tariffs, as amended or replaced:]
[Figure: 16 TAC §25.43(k)(3)(A)]

[(B) Small non-residential class. Bids for POLR service for small non-residential customers shall be compared assuming a demand level of 35 kW and a monthly usage level of 12,500kWh. If the POLR rates bid for these average usage levels exceed 125% of the applicable standard commercial price to beat rate for both usage levels at the time bids are submitted, the bid shall be rejected. For purposes of this rule, standard commercial price to beat rate shall refer to the following price to beat tariffs, as amended or replaced:]
[Figure: 16 TAC §25.43(k)(3)(B)]

[(C) Large non-residential class. Bids for POLR service for large non-residential customers shall be compared assuming a monthly demand of 2.5 MW and a monthly usage level of 1,000,000 kWh.]

[(4) POLR rates where POLR selected by lottery. This paragraph specifies the POLR rates that will be charged in a POLR area when the POLR is selected by lottery.]

[(A) Residential and small non-residential customer classes. The rate charged by a POLR selected by lottery shall be 125% of the applicable standard price to beat rate.]

[(B) Large non-residential class. The rate charged by a POLR selected by lottery shall be non- bypassable charges plus 150% of the applicable energy reference price as determined under paragraph (2)(C)(iii) of this subsection and a monthly customer charge of $2897. The minimum energy reference price shall be $7.25 per megawatt hour.]

(3) [(5) Good cause adjustment to POLR rates.] On a showing of good cause, the commission may permit the POLR to adjust the POLR rate, if necessary to ensure that the rate is sufficient to allow the POLR to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, POLR rates may be adjusted on an interim basis for good cause shown and after at least three days' notice and an opportunity for hearing on the request for interim relief. [Alternatively, the commission may rebid POLR service and relieve the current POLR of its POLR responsibilities. If POLR service is rebid, the process specified in subsection (i) of this section shall be followed except that eligible REPs shall be those REPs identified in the last list that was published, with the POLR that is being relieved of its duties deleted from the list. If the commission elects to rebid POLR service and the bid process is unsuccessful, the commission may reconsider adjusting the POLR rates or select an alternate POLR provider by lottery in accordance with the provisions of subsection (j) of this section.]

(l) Prohibition on serving as POLR. A POLR REP shall not be obligated to serve a customer within a customer class or a POLR area that the POLR REP is not designated as a volunteering POLR REP or a non-volunteering POLR provider. If a POLR REP challenges a customer assignment of ERCOT, and the discrepancy cannot be resolved, the TDU in the applicable POLR area will determine the customer class and if the customer resides within the TDU service area. The customer

will then be served by the appropriate POLR. [~~Adjustment to energy charge component of residential and small non-residential POLR rates. The energy charge component of the POLR rate for the residential and small non-residential customer classes shall be adjusted as specified in this subsection if POLR service was awarded by bid.~~]

[~~(1) Energy charge component reevaluated monthly. The energy charge component of the POLR rate for the residential and small non-residential customer classes shall be recalculated at the end of every month during the POLR term in accordance with the provisions of paragraph (2) of this subsection. If the recalculated energy charge varies by more than 5.0% from the time the energy charge was bid or last adjusted, then the energy charge of the POLR rate for the following month shall be equal to the recalculated energy charge. If the recalculated energy charge does not vary by more than 5.0% from the time the energy charge was bid or last adjusted, then the energy charge component shall not be adjusted for the following month. All adjustments shall take place during the first billing cycle of the billing month following the recalculation. Adjustments shall not occur during the customer's billing month. The POLR shall submit its monthly rate to the commission at least 15 days prior to the beginning of the applicable month.~~]

[~~(2) Energy charge calculation.~~]
[~~Figure: 16 TAC §25.43(l)(2)~~]

[~~(3) Refunds. If in response to a complaint or upon its own investigation, the commission determines that a POLR failed to properly adjust the energy charge component of the POLR rate and as a result overcharged its customers, the commission shall require the POLR to issue refunds to the specific customers who were overcharged.~~]

(m) Limitation on liability. The POLR providers will make reasonable provisions to provide POLR service to customers who request POLR service, or are transitioned to POLR service, individually or through a mass transition; however, in no event other than gross negligence or intentional misconduct, shall the POLR providers be liable to a POLR customer, another REP, or any other third party for any consequential, exemplary, special, incidental, or punitive damages, including without limitation, lost opportunities or lost profits related to providing or preparing to provide POLR service. [~~Marketing to POLR customers. An employee answering the POLR phone line will read from a script to describe POLR service but may market the services of its affiliates or any other REP that has entered into a marketing agreement with the POLR. The POLR shall not discriminate between unaffiliated REPs in the terms and conditions of any such marketing agreement. The POLR shall provide to REPs and aggregators on at least a quarterly basis an updated mass customer list of customers served by the POLR containing information similar to the information that the registration agent is authorized to release under §25.472 of this title (relating to Privacy of Customer Information). The POLR shall not be required to comply with the provisions of §25.472(a)(2) of this title prior to releasing its list of customers~~]

(n) Transition of customers to POLR service.

(1) (No change.)

(2) A customer other than a residential customer or small commercial customer (as defined in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) may agree to a contract or terms of service that allow a REP to transfer the customer to a POLR for reasons other than non-payment, including the failure of the customer and its REP to agree on terms of renewal or extension. Unless ERCOT has a transaction that allows REPs to transfer such customers to the POLR, the POLR shall accept written requests for such transfers from REPs and shall initiate a switch for the customer to be transferred to the POLR. The acquisition by the POLR of such customers is not a prohibited enrollment under §25.474 of this title (relating to the Selection or Change of Retail Electric Provider). [~~Further, §25.472(d) of this title (relating to Privacy of Customer Information) does not apply to such permitted customer transfers.~~]

(3) - (6) (No change.)

(7) A REP whose customers are transitioned to POLR providers shall return any unused portion of a transitioned customer's deposit within five business days.

(8) ERCOT shall create a database of customer information that will be populated and updated by all REPs to facilitate a mass transition of customers to the POLR REPs. ERCOT shall determine what customer information is necessary to populate the database. All REPs shall comply with the requirements of ERCOT to populate and maintain the customer information database. When a mass transition is initiated, the customer information shall be provided to the POLR provider gaining the customer no later than five business days from the date of mass transition initiation.

(9) When customers are transitioned to a POLR provider, the POLR provider may request usage and demand data from the appropriate TDU and from ERCOT, prior to the transition to the POLR provider. This information shall be provided under a confidentiality agreement.

(10) Information from the TDU and ERCOT to the POLR provider shall be provided in Texas SET format. However, it is allowable to supplement the information to the POLR provider in other formats and fashions to expedite the transition to the POLR provider. This transfer of information will not constitute a violation of the customer protection rules provided the information is provided under a confidentiality agreement.

(11) A POLR may require a deposit from the customer being transitioned to the POLR to continue to serve the customer once the POLR has begun serving the customer. A POLR may request the deposit before the POLR begins serving the customer, but the POLR shall begin providing service to the customer even if the service initiation date is before the POLR receives the deposit, if any deposit is required, and shall not disconnect the customer until the appropriate time period to submit the deposit has elapsed. The POLR provider may waive the deposit requirement if the waiver is applied in a non-discriminatory fashion. The POLR provider shall waive the deposit requirement for residential customers if the customer meets the qualifications listed in section 2. SECURITY AND BILLING, of the Standard Terms of Service.

(12) On the occurrence of one of the following events, ERCOT shall initiate a mass transition of a REP's customers to the POLR providers:

(A) Termination of the Load Serving Entity (LSE) or Qualified Scheduling Entity (QSE) Agreement with ERCOT;

(B) Commission Order declaring a REP in default of Tariff for Retail Delivery Service;

(C) Commission Order de-certificating a REP;

(D) Commission Order requiring a mass transition to POLR providers; and,

(E) At the request of a REP, for the mass transition of that REP's customers, however, the POLR shall not be used as a means to eliminate non-profitable contracts.

(13) ERCOT shall investigate the feasibility of revising the mass transition process so that customer transfers in a mass transition are initiated by ERCOT, rather than by a REP. ERCOT shall report its

conclusions to the commission and implement the revised process, if directed by the commission. ERCOT may provide procedures for the mass transition process, consistent with this section.

(14) Until the database described in paragraph (8) of this subsection is complete, a REP whose customers are to be transitioned to POLR providers shall provide the following information to the appropriate POLR provider. Providing the information to the POLR providers under the conditions of a transition to POLR providers shall not constitute a violation of Subchapter R of this chapter:

(A) REP's Data Universal Numbering System (DUNS) number;

(B) Customer's ESI ID number;

(C) Customer's account number with the REP that is losing the customer;

(D) Customer's name;

(E) Customer's telephone number;

(F) Customer's billing "care of" name;

(G) Customer's service address;

(H) Customer's billing address;

(I) Customer's most recent 12 month usage and demand; and,

(J) Customer's TDSP charges.

(o) Termination of POLR status.

(1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:

(A) If the POLR fails to maintain REP certification;

(B) If the POLR fails to provide service in a manner consistent with this section; [~~or~~]

(C) For good cause, provided the commission affords the POLR due process;[~~.~~] or,

(D) The POLR fails to maintain appropriate financial qualifications.

(2) If a POLR defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the next REP that is still eligible per subsection (h) of this section will assume the duties of the former POLR. [~~the commission may appoint any certified REP, other than a REP serving only its own affiliates, serving a customer class in that area to become the POLR until a new POLR is selected pursuant to the provisions of this rule. The rate for such POLR service shall be the rate established pursuant to subsection (k)(4) of this section.~~]

(3) The provisions of this paragraph address the transition to a new POLR at the end of a POLR term.

(A) (No change.)

(B) A notice containing the information specified in either subparagraph (C) or (D) of this paragraph, as applicable, shall be provided to each POLR customer at least 60 days prior to the end of the POLR term. The notice shall be in type no smaller than 12 points in size. [~~The notice shall satisfy the requirements of §25.474(m) of this title in the event that the customer fails to switch to another provider and is transferred by the POLR to a competitive affiliate of the outgoing POLR or the customer fails to switch to another provider and is transferred to the incoming POLR by the outgoing POLR.~~] The notice shall also include a phone number for the outgoing POLR for the customer to call to obtain more information.

(C) The notice provided by a POLR that elects to transfer customers who fail to switch to another provider to a competitive affiliate shall include a comparison of the POLR rates currently charged to the customer to the rate offered by the competitive affiliate of the outgoing POLR [~~as well as the applicable price to beat rate~~]. The notice shall specify the deposit requirements of the competitive affiliate of the outgoing POLR and shall state that other providers may also require a deposit and may require payment of any amounts owed the provider for services previously rendered. The notice shall state where the customer may find additional information about offerings of other providers and shall inform the customer that, if the customer does not select another provider or request service from the incoming POLR by a specified date, that a competitive affiliate of the outgoing POLR will continue to serve the customer at the rate specified in the notice.

(D) (No change.)

(E) If a POLR customer either requests service from the incoming POLR or is terminated to the incoming POLR by the outgoing POLR, the outgoing POLR shall offset the customer's final bill against the customer's deposit and refund any remaining balance to the customer within 20 days from the customer's final meter read date. The customer shall be entitled to pay the deposit required by the incoming POLR in two installments in the manner provided in §25.478(e)(3) [~~§25.478(f)(4)~~] of this title (relating to Credit Requirements and Deposits).

(p) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may propose to delegate to the commission its authority to select [~~a~~] POLR providers under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions will apply:

(1) (No change.)

(2) The delegation of authority will be made at least 30 days prior to the time the commission issues a publication of notice of eligibility [~~an invitation for bids to establish a POLR for a contiguous or surrounding POLR area~~];

(3) (No change.)

(4) The electric cooperative wishing to delegate its authority to designate a POLR will also provide the commission with the authority to apply the selection criteria and procedures described in this section in selecting the POLR providers within the electric cooperative's certificated service area; and

(5) If there are no competitive REPs offering service in the [~~If the competitive bidding process that includes the~~] electric cooperative certificated area [~~fails~~], the commission will automatically reject the delegation of authority.

(q) (No change.)

(r) Waiver of customer protection rules.

(1) The provisions of §25.475(e) [~~(d)~~] of this title requiring issuance of a revised terms of service statement to customers 45 days prior to any material change in the customer's terms of service shall not apply with respect to the implementation of the provisions of subsection (b)(3) of this section or §25.483(b) of this title.

(2) Certain customer protection rules may be waived for the small non-residential greater than or equal to 50 kW customer class, pursuant to the Standard Terms of Service.

(s) Notice of Transition to POLR Service. When a customer is moved to POLR service the customer will be provided notice of the transition by the REP transitioning the customer as well as by the POLR provider. Notice shall be provided as soon as the transitioning REP knows the customer will be transitioned to POLR service and as soon as the POLR has the customer contact information. The notice of transition to POLR service shall include, at a minimum the following items:

(1) Notice by the REP transitioning the customer:

(A) The reason for the transition to POLR service;

(B) A statement that the customer will receive a separate notice from the POLR that will disclose the date the POLR provider will begin serving the customer;

(C) A description of how and when any unused customer deposit will be returned to the customer; and,

(D) The following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.com for a list of providers in your area;"

(E) If applicable, a description of the activities that the REP will use to collect any outstanding payments, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP; and,

(F) Notice to the customer that the customer may accelerate a switch to another REP by requesting a "special or out-of-cycle meter read" and paying the applicable transmission and distribution utility charge for the meter read.

(2) Notice by the POLR provider:

(A) The date the POLR provider will begin serving the customer;

(B) A description of the POLR pricing mechanism and the current POLR rate;

(C) The deposit requirements of the customer and any applicable deposit waiver provisions;

(D) The following statement: "If you would like to choose a different retail electric provider, please access www.powertochoose.com for a list of providers in your area;"

(E) The applicable POLR Standard Terms of Service;

(F) The applicable disconnection procedures; and,

(G) Notice to the customer that the customer may accelerate a switch to another REP by requesting a "special or out-of-cycle meter read" and paying the applicable transmission and distribution utility charge for the meter read.

(t) Disconnection by POLR. The POLR provider must comply with the applicable customer protection rules as provided for under Subchapter R of this chapter except as otherwise stated in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200601043
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 936-7223

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SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §§25.502, 25.504, 25.505

The Public Utility Commission of Texas (commission) proposes amendments to §25.502, relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas, new §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region, and new §25.505, relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region. The proposed amended rule and new rules eliminate the Modified Competitive Solution Method (MCSM); define the term "market power" with respect to the wholesale electricity market in the Electric Reliability Council of Texas (ERCOT) power region, and establish mechanisms to address scarcity pricing and resource adequacy in the ERCOT power region. These rules are competition rules subject to judicial review as specified in the Public Utility Regulatory Act (PURA), Texas Utilities Code §39.001(e). Project Number 31972 is assigned to this proceeding.

Development of proposed new §25.504 took place under Project Number 29042, Rulemaking on Definition of Wholesale Electric Market Power in the ERCOT Power Region. Development of proposed new §25.505 took place under Project Number 24255, Rulemaking Concerning Planning Reserve Margin Requirements. In addition, on September 2, 2005, commission staff published in the *Texas Register* (30 TexReg 5446) a request for public comment in Project Number 23100, PUC Market Oversight Activities, on the Modified Competitive Solution Method (MCSM), which had been ordered in Docket Number 24770, Report of the Electric Reliability Council of Texas (ERCOT) to the PUCT Regarding Implementation of the ERCOT Protocols. Project Numbers 29042 and 24255, along with consideration of MCSM, have been combined into Project Number 31972.

The amendment and proposed new sections are intended to provide greater certainty to the public and to market participants concerning how the commission will determine the existence of market power in the ERCOT wholesale electricity markets and the actions the commission and ERCOT will take to assure an adequate supply of electricity in the ERCOT market. In 2004, the commission adopted §25.503, relating to Oversight of Wholesale Market Participants. That rule prohibited certain conduct by market participants who have market power, however, the term "market power" was not defined in the rule or in PURA. Subsequent investigations by the commission have demonstrated the need to define the term "market power," both to assist the commission in its enforcement efforts and to provide assurances to market participants concerning how the prohibitions in §25.503 would be applied. Accordingly, proposed new §25.504 will provide a definition of "market power."

Although Texas currently has an adequate and reliable supply of electricity available to meet its projected demands, recent growth in demand has indicated the need to assure that the ERCOT market sends the appropriate price signals to encourage continued growth in supply, both from generation resources and load

resources. Proposed new §25.505 establishes mechanisms by which ERCOT can obtain needed information from market participants, assess resource adequacy and provide its assessment to the market. The new section also allows ERCOT to enter into contracts to obtain additional supply to assure the reliability of the ERCOT grid. In order to encourage growth in the supply of generation resources, the proposed section allows for a structured increase in bid caps applicable in the ERCOT market and establishes a scarcity pricing mechanism. To encourage growth in the supply of load resources, the rule requires ERCOT to take steps designed to improve the ability of load resources to respond to price changes as a means of increasing the supply of electricity. Finally, the proposed section requires that certain information submitted by suppliers as confidential information be released to the market after an appropriate period of time, as a means of assuring that market participants can assess the competitiveness of the market. The commission anticipates that such action will enhance competition and will also enhance the commission's enforcement efforts by providing increased scrutiny of market participants by other market participants and the public.

Because of the significant changes being proposed in §25.505, the commission has determined that the existing disclosure provisions and system-wide offer cap contained in §25.502 should be eliminated, as indicated in the proposed amendment. For similar reasons, §25.502 is also being amended to eliminate the Modified Competitive Solution Method ordered by the commission in Docket No. 24770.

When commenting on specific subsections of the proposed rules, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other areas already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. In doing so, parties are strongly encouraged to address the concerns of these rules, which are *how to identify market power* and *how to ensure resource adequacy*. The commission is only interested in receiving "leading edge" examples which are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

In addition, the commission invites comment on the following questions.

1. Definition of market power. The term "exclude competition" is used by the U.S. Supreme Court in the seminal antitrust case *U.S. v. E.I. Du Pont de Nemours & Co*. Earlier versions of this proposed rule replaced "exclude" with "impair." Please comment on which term would be more suited to a definition of market power applicable to a wholesale electricity market.

2. Disclosure of disaggregated data. With respect to proposed §25.505(f), the commission seeks comment on potential commercial impacts of disclosing disaggregated, resource/qualified scheduling entity (QSE) specific, offer and quantity information two days after real-time and disclosing other information after 30 days. The commission has received general comments on the potential impacts of the disclosure of disaggregated offer information, but requests that commenters please articulate clear examples of potential commercial impacts to your company that will result from disclosure of each specific type of information and how the rule could be revised to address those impacts.

3. Credit requirements. The commission seeks comment on whether the credit requirements for QSEs in the current ERCOT Protocols will be sufficient if the offer caps are raised to the levels proposed in §25.505(i). If the current credit requirements will not be sufficient after the adoption of the proposed rule, should modifications or additional credit requirements be specified in a commission-sponsored rulemaking, or left to the ERCOT stakeholder process? If such modifications or additional requirements should be specified in this rulemaking, then please provide recommended language and corresponding rationale, for possible adoption as part of §25.505.

4. Considerations in setting the levels of the system-wide offer cap. The commission seeks comment on the appropriate levels of the system-wide offer caps from the implementation date of §25.505 through 2009. When commenting on this issue, please address what factors impact your answers, including those listed below:

(a) The appropriate length (number of hours) and intensity (level of prices) of scarcity pricing for the ERCOT market. For instance, greater number of hours allowed for scarcity pricing would result is a lower cap applied in each hour to reach the $150,000 threshold in proposed §25.505(i)(5)(iv). Conversely, a shorter time would allow a higher individual cap. The commission seeks input on how to balance these two variables.

(b) The appropriate level of the HCAP that would strongly encourage forward contracting for resources by load-serving entities.

(c) The projected reserve margin through 2010, as presented in ERCOT's most recent report on capacity, demand, and reserves.

(d) The level of HCAP that would encourage more demand-side participation (industrial loads, large commercial loads, small commercial loads, residential loads, energy efficiency programs) in current or planned ERCOT-operated markets (both real-time and centralized day-ahead). Please include a discussion of what factors, besides the level of the offer cap, may influence loads to increase their demand-side response in these markets.

5. Timing of the Annual Resource Adequacy Cycle. The commission seeks comment on the start date of the Annual Resource Adequacy Cycle. Proposed §25.505 has the start date as January 1 of each year. Other start dates the commission is considering are October 1, March 1, and May 1. Another alternative being considered is to enforce the low system-wide offer cap whenever the Peaker Net Margin for the previous 365 days is equal to or greater than $150,000 per megawatt and reinstate the high system-wide offer cap when the Peaker Net Margin for the previous 365 days drops below $75,000 per megawatt. Please state your preference for the start date and the reason for your preference. In particular, the commission seeks comments on the impact of the start date on the level and timing of scarcity pricing in the summer months and resource availability during extreme weather events in the winter months.

6. Resource Adequacy Backstop. The commission seeks comment from ERCOT and other parties on the circumstances and timing of events that may trigger the implementation of the procedures in §25.505(j), as well as other possible resource adequacy backstop mechanisms than the one described in §25.505(j). Please describe any alternative in detail, provide the rationale for preferring the alternative approach, and provide rule language that the commission could use to implement the alternative.

David Hurlbut, Senior Economist, Electric Division, and Eric Schubert, Senior Market Economist, Electric Division, have determined that for each year of the first five years the proposed

amendment to §25.502, new §25.504, and new §25.505 will be in effect, enforcing or administering the rules does not have foreseeable implications relating to cost or revenues for state or local government.

Dr. Hurlbut has determined that for each year of the first five years the proposed amendment to §25.502 will be in effect, the public benefit expected as a result of adopting the proposed amendment to §25.502 will be an improvement in the orderly transition to an energy-only market. MCSM was designed to address "hockey stick" pricing, in which a supplier prices a small portion of its offer exorbitantly higher than the rest of its offer. The provisions of new §25.504 and §25.505 are expected to address most, if not all, of the concerns related to hockey-stick pricing, eliminating the need for MCSM. If there are any remaining concerns about hockey-stick pricing, the appropriate venue for considering those matters is in Project Number 31575, Improvements to the ERCOT Zonal Market Design. Dr. Hurlbut has also determined that for each year of the first five years the proposed amendment to §25.502 will be in effect, there are no probable economic costs to persons required to comply with the proposed amendment to §25.502, because the amendment is limited to deletion of an existing pricing restriction.

Dr. Hurlbut has determined that for each year of the first five years the proposed new §25.504 will be in effect, the public benefit expected as a result of adoption of new §25.504 section will be increased certainty with respect to the determination of what entities, if any, possess market power within ERCOT. This will enable the commission to take appropriate action, through enforcement proceedings or mitigation measures, to protect the public interest from the possible abuse of market power by entities possessing market power. The rule will also provide greater certainty to market participants concerning the application of commission rules dealing with wholesale market activities. By enhancing the commission's ability to address any market power abuses, the proposed rule also provides greater assurance that changes in the wholesale price of electricity are indicative of scarcity or surplus of supply rather than the ability of any supplier to control prices through the exercise of market power. In order for high prices in an energy-only market to provide assurance that new capacity should be added and will be profitable, all market participants, the investment community, and the general public must be assured that no supplier has the ability to control energy prices without regard to scarcity.

In addition to providing a definition of market power applicable to all wholesale electricity-related markets in the ERCOT power region, the new §25.504 will provide some clarity about generation entities that are simply too small to have market power on a system-wide basis in ERCOT. The pricing activities of these smaller entities are sufficiently disciplined by competitive pressures that an ERCOT-wide market power review is not necessary. Accordingly, an exemption is appropriate for such small entities. For larger generation entities, who could conceivably have market power, the proposed rule includes a provision for a generation entity to propose a voluntary mitigation plan for commission approval, although obtaining such a plan is not required. If approved, the voluntary mitigation plan would establish guidelines for pricing that would not be considered economic withholding. The additional certainty provided by the proposed rule will benefit all market participants and the public.

Dr. Hurlbut has determined that for each year of the first five years the proposed new §25.504 will be in effect, there are no probable economic costs to persons required to comply with new §25.504.

Dr. Hurlbut has determined that for each year of the first five years the proposed amended §25.502 and the proposed new §25.504 will be in effect, there will be no effect on a local economy, and therefore no local employment impact statement is required under Texas Government Code §2001.022.

Dr. Hurlbut has determined that proposed amended §25.502 and the proposed new §25.504 will not have an adverse economic effect on small businesses or micro-businesses.

Dr. Schubert has determined that for each year of the first five years the proposed new §25.505 will be in effect, the public benefit expected as a result of adoption of the proposed rule is assurance of resource adequacy in the ERCOT wholesale electricity market. In an energy-only market, like ERCOT, the economic incentive to build new capacity comes from scarcity-induced price signals rather than direct payments that are charged to all load-serving entities (LSEs), as is done in some other regions. Spot market prices are more volatile in an energy-only market, and the expectation of price volatility should dissuade an LSE from relying on the spot market for a large portion of its regular demand. Greater reliance on bilateral power purchase agreements should increase suppliers' ability to plan for new capacity and to efficiently manage their existing capacity.

A significant characteristic of an energy-only market is that it encourages demand response. To the extent that demand response reduces peak demand, additional public benefits expected to be produced by the new section include reduced transmission costs, greater reliability, and better use of generation resources.

Dr. Schubert has determined that for each year of the first five years the proposed new §25.505 will be in effect, there are no probable economic costs to persons required to comply with new §25.505, although ERCOT will incur small costs to administer the scarcity pricing mechanism.

Dr. Schubert has determined that for each year of the first five years the proposed new §25.505 will be in effect, there will be no effect on a local economy, and therefore no local employment impact statement is required under Texas Government Code §2001.022.

Dr. Schubert has determined that the proposed new §25.505 will not have an adverse economic effect on small businesses or micro-businesses.

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, May 2, 2006, at 9:30 a.m.

Comments on the proposed amended section and new sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment and sections. The commission will consider the costs and benefits in deciding whether to adopt the

amendment and sections. All comments should refer to Project Number 31972.

This amendment and these new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anticompetitive; PURA §39.001, which establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; PURA §39.101, which establishes that customers are entitled to protection from unfair, misleading, or deceptive practices, and gives the commission the authority to adopt and enforce rules to carry out this provision; PURA §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; and PURA §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.004, 39.001, 39.101, 39.151, and 39.157.

§25.502. Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas.

(a) - (c) (No change.)

(d) Disclosure of offer prices. ERCOT shall publish on its market information system:

(1) - (3) (No change.)

(4) The requirements of this subsection shall terminate upon ERCOT's implementation of §25.505(f) of this title (relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region).

(e) - (g) (No change.)

(h) System-wide offer cap. A supply offer shall not exceed $1,000/MWh or $1,000/MW/h. This offer cap shall be terminated on the date that the system-wide offer caps are implemented as required in §25.505(i)(6) of this title. ERCOT shall terminate its use of the Modified Competitive Solution Method, ordered by the commission in Docket No. 24770, on September 1, 2006.

§25.504. Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

(a) Application. This section applies to all generation entities in the Electric Reliability Council of Texas (ERCOT). This section defines the term "market power," as that term is used in §25.503 of this title (relating to Oversight of Wholesale Market Participants).

(b) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context or specific language of a section indicates otherwise:

(1) Generation entity--An entity that controls a generation resource. An entity affiliated with a generation entity shall be considered part of that generation entity.

(2) Market power--The ability to control prices or exclude competition in a relevant market.

(c) Exemption based on installed generation capacity. A single generation entity that controls less than 5% of the installed generating capacity in ERCOT, as the term "installed generating capacity" is defined in §25.5 of this title (relating to Definitions), is deemed not to have ERCOT-wide market power. Controlling 5% or more of the installed generating capacity in ERCOT does not, of itself, mean that a generating entity has market power.

(d) Withholding of production. Prices offered by a generation entity with market power may be a factor in determining whether the entity has withheld production. A generation entity with market power that prices its services substantially above its marginal cost may be found to be withholding production; offer prices that are not substantially above marginal cost do not constitute withholding of production.

(e) Voluntary mitigation plan. Any generation entity may submit to the commission a mitigation plan for ensuring compliance with §25.503(g)(7) of this title or with the Public Utility Regulatory Act §39.157(a). Any plan that is submitted may be revised, with the agreement of the market participant, and approved or rejected by the commission. Adherence to a plan approved by the commission constitutes an absolute defense against an allegation of market power abuse with respect to behaviors addressed by the plan. Failure to adhere to a plan approved by the commission does not, of itself constitute a violation of §25.503(g)(7) of this title, but may be treated in the same manner as any other violation of a commission order.

§25.505. Resource Adequacy in the Electric Reliability Council of Texas Power Region.

(a) General. The purpose of this section is to prescribe mechanisms that the Electric Reliability Council of Texas (ERCOT) shall establish to provide for resource adequacy in the energy-only market design that applies to the ERCOT power region. The mechanisms are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region, and to encourage market participants to take advantage of practices such as hedging, long-term contracting between market participants that supply power and market participants that serve load, and price responsiveness by end-use customers.

(b) Definitions. The following terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) Generation entity--an entity that owns or controls a generation resource.

(2) Load entity--an entity that owns or controls a load resource, including, but not limited to, a load acting as a resource (LaaR) or a balancing up load (BUL), as those terms are defined in the ERCOT Protocols.

(3) Resource entity--an entity that owns or controls a generation or load resource.

(c) Statement of opportunities (SOO). ERCOT shall publish an SOO that provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities to reliably meet ERCOT's projected needs. An SOO published in even-numbered years shall use a ten-year study horizon and be published by December 31 of those years. An SOO published in odd-numbered years shall use a five-year study horizon and be published on or around October 1 of those years. ERCOT shall prescribe reporting requirements for generation entities and transmission service providers (TSPs) to report to ERCOT their plans for adding new facilities, upgrading existing facilities, and mothballing or

retiring existing facilities. ERCOT also shall prescribe reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources.

(d) Projected assessment of system adequacy (PASA). Beginning no later than September 1, 2006, ERCOT shall provide market participants with information to assess the adequacy of resources and transmission facilities to meet projected demand in the following two reports:

(1) Each month, ERCOT shall publish a Medium-Term PASA for each week of the subsequent three years beginning with the week after the Medium-Term PASA is published. At a minimum, each Medium-Term PASA shall include the following information:

(A) Load forecast by ERCOT zone or area;

(B) Ancillary service requirements;

(C) Transmission constraints, including planned outages; and

(D) Aggregated information on the availability of resources, including load resources.

(2) Each day, ERCOT shall publish a Short-Term PASA for each hour for the seven days beginning with the day the Short-Term PASA is published. At a minimum, each Short-Term PASA shall include the following information:

(A) Load forecast by ERCOT zone or area;

(B) Ancillary service requirements;

(C) Transmission constraints, including planned outages; and

(D) Aggregated information on the availability of resources, including load resources.

(e) Filing of resource and transmission information with ERCOT. ERCOT shall prescribe reporting requirements for resource entities and TSPs for the preparation of PASAs. At a minimum, the following information shall be reported to ERCOT:

(1) TSPs shall provide ERCOT with information on planned and existing transmission outages.

(2) Generation entities shall provide ERCOT with information on planned and existing generation outages.

(3) Load entities shall provide ERCOT with information on planned and existing availability of LaaRs, specified by type of ancillary service, and BULs.

(4) Generation entities shall provide ERCOT with a complete list of generation resource availability and performance capabilities, including, but not limited to:

(A) the net dependable capability of generation resources;

(B) projected output of non-dispatchable resources such as wind turbines, run-of-the-river hydro, and solar power; and

(C) output limitations on generation resources that result from fuel or environmental restrictions.

(5) Load serving entities (LSEs) shall provide ERCOT with complete information on load response capabilities pursuant to bilateral agreements between LSEs and their customers.

(f) Publication of resource and load information in ERCOT markets. To increase the transparency of the ERCOT-administered markets, ERCOT shall post at a publicly accessible location on its website, beginning no later September 1, 2006, the information required pursuant to this subsection.

(1) The following information in aggregated form, for each settlement interval and for each area where available, shall be posted two calendar days after the day for which the information is accumulated.

(A) Quantities and prices of offers for energy and each type of ancillary capacity service, in the form of supply curves.

(B) Self-arranged energy and ancillary capacity services, for each type of service.

(C) Actual resource output.

(D) Load and resource output for all entities that dynamically schedule their resources.

(E) During the operation of the market under a zonal market design, scheduled load and actual load. During the operation of the market under a nodal market design, firm scheduled load, scheduled load with "up to" limits on congestion charges, and actual load.

(F) During the operation of the market under a nodal market design, the following day-ahead market information: load bids, including virtual loads, in the form of day-ahead bid curves, and cleared load.

(2) The following information in entity-specific form, for each settlement interval, shall be posted as specified below.

(A) During the operation of the market under a zonal market design,

(i) Portfolio offer curves for balancing energy and for each type of ancillary service, for each area where available, shall be posted 48 hours after the day for which the information is accumulated.

(ii) Other offer-specific information, as well as the amount of capacity on each resource in excess of the resource's planned operating level, self-arranged energy and ancillary capacity services, and actual resource output, for each type of service and for each area where available shall be posted 30 days after the day for which the information is accumulated.

(iii) The information posted shall include the names of the resources in the portfolio that were committed, the name of the entity submitting the information, the name of the entity controlling each resource in the portfolio.

(B) During the operation of the market under a nodal market design,

(i) Virtual offer curves (prices and quantities) and the other offer curves (prices and quantities) for energy and for each type of ancillary service, at each settlement point, shall be posted 48 hours after the day for which the information is accumulated.

(ii) Other resource-specific information, as well as self-arranged energy and ancillary capacity services, and actual resource output, for each type of service and for each resource at each settlement point shall be posted 30 days after the day for which the information is accumulated.

(iii) The posted information shall be linked to the name of the resource (or identified as a virtual offer), the name of the entity submitting the information, and the name of the entity controlling the resource. If there are multiple offers for the resource, ERCOT shall post the specified information for each offer for the resource, including the name of the entity submitting the offer and the name of the entity controlling the resource.

(C) The load and generation resource output for each zone, for each entity that dynamically schedules its resources, shall be posted 48 hours after the day for which the information is accumulated.

(D) During the operation of the market under a zonal market design, scheduled load and actual load for each zone. During the operation of the market under a nodal market design, virtual load bids and the bid curve for each load, firm scheduled load, scheduled load with "up to" limits on congestion charges, and actual load for each settlement point. The information shall be posted 48 hours after the day for which the information is accumulated and shall be linked to the name of the entity submitting the information and the name of the entity serving the load.

(E) ERCOT shall use §25.502(e) of this title (relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas) as the basis for determining the control of a resource and shall include this information in its market operations data system.

(g) Credit standards for qualified scheduling entities. ERCOT shall maintain credit standards for qualified scheduling entities that are consistent with this section.

(h) Improving price responsiveness of load. ERCOT shall work with market participants to create the necessary conditions for, and remove impediments to, price response by load. As part of this process, ERCOT shall file progress reports at the commission six, eighteen, and thirty months after the effective date of this section that identify impediments to price response by load, proposed solutions that are cost-effective in addressing those impediments, and progress made in removing those impediments. The report shall include:

(1) A review of the compatibility of existing load profiles with market-based demand-side options, such as time-of-use pricing and direct load control programs.

(2) An estimate of the incremental costs of installing interval data recording meters for commercial and industrial customers that use load profiles for settlement.

(3) A review of the ERCOT process for assigning a load profile to a customer, to assess the compatibility of the current process with providing appropriate price signals to loads; specifically addressing the range of profile types in use, the accuracy of the profile assignment process, and identification of the need for improvements.

(4) A review of the ERCOT load profiling methodology to assess the compatibility of the current methodology with providing appropriate price signals to loads, specifically addressing whether true- or lagged-dynamic profiles would improve the accuracy of those price signals.

(i) Scarcity pricing mechanism (SPM). ERCOT shall administer the SPM. The SPM shall take effect on January 1, 2007, unless the commission by order changes this date. The SPM shall operate as follows:

(1) The SPM shall operate on an annual resource adequacy cycle, starting on January 1 and ending on December 31 of each year.

(2) For each day of the annual resource adequacy cycle, the peaking operating cost (POC) shall be 10 times the daily Houston Ship Channel gas price index for the previous business day. The POC is calculated in dollars per megawatt-hour (MWh).

(3) For the purpose of this section, the real-time energy price (RTEP) shall be measured as the price at an ERCOT-calculated ERCOT-wide hub.

(4) In the annual resource adequacy cycle, the peaker net margin (PNM) shall be calculated as:

Figure: 16 TAC §25.505(i)(4)

(5) Each day ERCOT shall post at a publicly accessible location on its website the updated value of the PNM, in dollars per megawatt (MW).

(6) The system-wide offer caps shall be as follows:

(A) Beginning March 1, 2007, the high system-wide offer cap (HCAP) shall be $2,000 per MWh and $2,000 per MW per hour. The low system offer cap (LCAP) shall be set on a daily basis at the higher of:

(i) $500 per MWh and $500 per MW per hour; or

(ii) 50 times the daily Houston Ship Channel gas price index of the previous business day, expressed in dollars per MWh and dollars per MW per hour.

(B) Beginning March 1, 2008, the HCAP shall be $2,500 per MWh and $2,500 per MW per hour.

(C) Beginning March 1, 2009, the HCAP shall be $3,000 per MWh and $3,000 per MW per hour.

(D) At the beginning of the annual resource adequacy cycle, the system-wide offer cap shall be set equal to the HCAP and maintained at this level as long as the PNM during an annual resource adequacy cycle is less than or equal to $150,000 per MW. If the PNM exceeds $150,000 per MW, the system-wide offer cap shall be reset at the LCAP for the remainder of the annual resource adequacy cycle.

(E) The Independent Market Monitor, as part of its responsibilities pursuant to Public Utility Regulatory Act §39.1515(h), may conduct an annual review of the effectiveness of the SPM.

(j) Authority to enter into emergency load response (ELR) contracts to maintain reliability. If ERCOT concludes that the available generation and load resources are insufficient to maintain reliability, ERCOT may enter into ELR contracts with load resources to procure sufficient voluntary load curtailment under emergency conditions. ERCOT shall enter into ELR contracts pursuant to this subsection under the following conditions:

(1) By October 1, 2006, ERCOT shall file a report with the commission that provides an assessment of the types of load resources that it would prefer to use for ELR contracts.

(2) ERCOT shall use the information provided in the PASAs as a benchmark for determining the need for ELR contracts.

(3) The ELR contracts shall have terms no shorter than 90 days but no longer than one year.

(4) ERCOT shall deploy ELR resources only as part of an Emergency Electric Curtailment Plan.

(5) ERCOT shall recover the costs of ELR contracts on a system-wide energy / load ratio share basis.

(6) This subsection does not limit ERCOT purchases for other reasons, such as the following:

(A) routine purchases of ancillary capacity services and energy in the ERCOT day-ahead and real-time markets;

(B) reliability unit commitment;

(C) black-start service; and

(D) reliability must-run or similar contracts that address local reliability concerns.

(k) Development and implementation. ERCOT shall use a stakeholder process to develop protocols that comply with this section.

Nothing in this section prevents the commission from taking actions necessary to ensure that system reliability in ERCOT is maintained, including actions that are otherwise inconsistent with the other provisions in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Adriana A. Gonzales
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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.417

The Public Utility Commission of Texas (commission) proposes an amendment to 26.417. The proposed new subsection (i) relating to Annual Affidavits from Eligible Telecommunications Providers (ETPs) will define the requirements for ETPs to submit annual affidavits of compliance in order to certify that Texas Universal Service Funds (TUSF) received are being used in a manner consistent with the requirements regarding the use of money from each TUSF program for which the telecommunications provider receives disbursements. Project Number 32161 is assigned to this proceeding.

Liz Kayser, Policy Analyst, Communications Industry Oversight Division, and Jim Tourtelott, Staff Attorney, Telecommunications Legal Section, have determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the section.

Ms. Kayser and Mr. Tourtelott have determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the ability of the commission to ensure that providers are complying with the reporting requirements of PURA §56.030. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is some anticipated economic cost to persons who are required to comply with the section as proposed, but the public benefit of ensuring that ETPs are complying with PURA §56.030 should outweigh those costs.

Ms. Kayser and Mr. Tourtelott have also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed new subsection. The commission will consider the costs and benefits in deciding whether to adopt the new subsection. All comments should refer to Project Number 32161.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §56.030, which specifically requires telecommunication providers that receive disbursements from the TUSF to provide the aforementioned affidavits.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §56.030.

§26.417. Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF).

(a) - (h) (No change.)

(i) Requirements for annual affidavit of compliance to receive TUSF support. An ETP serving a rural or non-rural study area shall comply with the following requirements for annual compliance for the receipt of TUSF support.

(1) Annual Affidavit of Compliance. On or before September 1 of each year, an ETP that receives disbursements from the TUSF shall file with the commission an affidavit certifying that the ETP is in compliance with the requirements for receiving money from the universal service fund and requirements regarding the use of money from each TUSF program from which the telecommunications provider receives disbursements.

(2) Filing Affidavit. The affidavit used shall be the annual compliance affidavit approved by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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16 TAC §26.424

The Public Utility Commission of Texas (commission) proposes new §26.424, relating to Audio Newspaper Assistance Program. The proposed new rule will establish a program that provides financial assistance from the Texas universal service fund to support a free telephone service that offers blind and visually im-

paired residents access to the text of newspapers using synthetic speech. Project Number 31864 is assigned to this proceeding.

Josh Robertson, Policy Analyst, Communications Industry Oversight Division, and Sean Farrell, Staff Attorney, Telecommunications Legal Section, have determined that, for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Robertson and Mr. Farrell have determined that, for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be the ability for blind and visually impaired persons to access the text of newspapers that they would otherwise not be able to access. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Robertson and Mr. Farrell have also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

Comments on the proposed section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed section. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 31864.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §56.301, which requires the commission to establish rules to create a program to provide from the universal service fund financial assistance for a free telephone service for blind and visually impaired persons that offers the text of newspapers using synthetic speech.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, and §56.301.

§26.424. Audio Newspaper Assistance Program.

(a) Purpose. The provisions of this section establish a program providing financial assistance from the Texas universal service fund to support a free telephone service that allows blind and visually impaired persons access to the text of newspapers by using synthetic speech.

(b) Definitions. The following words and terms shall have the following meanings when used in this section, unless the context clearly indicates otherwise.

(1) Texas Newspaper--a serial publication that contains news on current events of special or general interest published within the state of Texas;

(2) National Newspaper--a serial publication that contains news on current events of special or general interest that is widely distributed in all fifty states;

(3) Registered User--a person who has met the eligibility criteria pursuant to subsection (e) of this section and has registered with the Audio Newspaper Program; and

(4) Audio Newspaper Program (ANP) Provider--the carrier awarded the Audio Newspaper Program contract by the commission.

(c) Requirements Audio Newspaper Program (ANP) Provider Must Meet. The provider of the ANP shall meet all of the requirements listed below.

(1) Components of ANP.

(A) The ANP shall provide registered users the following:

(i) access to ANP through a touch-tone phone;

(ii) access to ANP 24 hours a day, seven days a week;

(iii) access through a local number or through a nationwide toll-free number where local access is not available; and

(iv) access through a personal identification number.

(B) The ANP shall make available to registered users the following call features:

(i) complete text of each participating newspaper in the form of synthetic speech;

(ii) menu choices and navigation features that facilitate movement through menu items or articles;

(iii) ability to select one voice from a variety of choices and adjust the speaking rate of the selected voice;

(iv) commands for obtaining help, searching text, and spelling text with the capacity to interrupt the presentation and return to the information being read when the help, search, or spell command is activated; and

(v) access to customer service during regular business hours.

(C) The ANP shall also have the following additional features:

(i) capability of providing information to determine the number of registered users; and

(ii) capability of providing information to determine the monthly minutes of use.

(2) Content. The ANP shall provide access to the contents of both Texas newspapers and National newspapers:

(A) Texas Newspapers. the ANP shall have a minimum of two Texas newspapers available to registered users; and

(B) National Newspapers. the ANP may allow registered users access to National newspapers to the extent they are available.

(3) Updates. The ANP provider will update each newspaper carried as soon as practicable following the ANP's receipt of electronic files and will provide access to the current day's or most recent edition, the previous day's edition, and the current or most recent Sunday edition.

(4) Content Acquisition. The ANP provider shall attempt to integrate additional Texas newspapers, including Spanish language newspapers, into the ANP. Newspapers participating in the ANP are not eligible for payment.

(d) Reporting Requirements. The ANP provider shall submit the following reports to the commission every year by April 1:

(1) Content Acquisition Report. The content acquisition report shall consist of the following:

(A) a list of the newspapers included in the ANP and indicate those newspapers added to the ANP during the previous 12 months.;

(B) a list of the newspapers the ANP has attempted, but failed, to add to the ANP including for each:

(i) date(s) the newspaper was contacted;

(ii) method(s) used to contact the newspaper; and

(iii) reason(s) why the newspaper was not added to the ANP.

(C) a list of the newspapers that the ANP stopped providing in the previous year, including for each:

(i) date the ANP stopped providing the newspaper; and

(ii) reason(s) why ANP stopped providing the newspaper.

(2) Annual Usage Report. The annual usage report shall consist of the following:

(A) the number of registered users;

(B) the number of registered users in the previous year; and

(C) the total minutes of use for all registered users.

(3) Additional Reporting. The commission may specify additional reporting requirements.

(e) Eligibility and Registration.

(1) Eligibility. A person will be considered eligible for the ANP if the person produces evidence satisfactory to the ANP that said person resides within the state of Texas and:

(A) is registered with a state or private vocational rehabilitation agency for the blind;

(B) is enrolled in a public school special education program for the blind or state residential school for the blind;

(C) is registered with the Texas State Library and Archives Talking Book Program; or

(D) is in possession of a letter from an M.D. or a D.O. certifying that said person is legally blind or is visually impaired.

(2) Registration. The ANP provider shall allow eligible persons to register for the ANP through a mailing address or a fax number.

(3) Records Showing Eligibility. For each registered user, the ANP provider shall retain (a) electronic and/or photocopy records of all evidence produced to the ANP provider that satisfies the eligibility requirements described in this subsection and (b) the registered user's contact information. The ANP provider shall produce these records and contact information upon request by the commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT
SUBCHAPTER B. DEVELOPMENT AND ADMINISTRATION OF TESTS

19 TAC §101.25

The State Board of Education (SBOE) proposes an amendment to §101.25, concerning student assessment. Section 101.25 addresses scheduling the administration of tests. The proposed amendment would prohibit participation in University Interscholastic League (UIL) activities during the primary administration of statewide assessments.

Senate Bill 658 passed by the 79th Texas Legislature, 2005, added Texas Education Code (TEC), §33.0812, which requires the SBOE by rule to prohibit participation in a UIL area, regional, or state competition during the school week in which the primary administration of assessment instruments under TEC, §39.023(a), (c), or (l) occurs. Currently, 19 TAC §101.25 establishes provisions relating to scheduling and administering tests. The proposed amendment to 19 TAC §101.25 would add subsection (d) relating to prohibition of participation in UIL activities to comply with this legislation.

Senate Bill 658 also requires the commissioner of education to adopt rules to provide the UIL with a periodic calendar of dates reserved for testing for their planning purposes. The commissioner will adopt rules to provide this periodic calendar of dates at least every three years on or before May 1 of the year preceding the three-year cycle. The commissioner will also, as required by this legislation, adopt rules to determine the school week during the school year in which the primary administration of assessment instruments will occur; establish procedures for changing, in exceptional circumstances, testing dates reserved under the testing calendar; and establish criteria for determining whether a UIL competition must be canceled if the event conflicts with a changed testing date. To implement this legislation, the commissioner has proposed new rules in 19 TAC Chapter 101, Assessment, Subchapter EE, Commissioner's Rules Concerning the Statewide Testing Calendar and UIL Participation. The proposal was published in the February 3, 2006, issue of the *Texas Register* (31 TexReg 633).

Susan Barnes, associate commissioner for standards and programs, has determined that for the first five- year period the amendment is in effect there will be no fiscal implications for state

or local government as a result of enforcing or administering the amendment.

Dr. Barnes has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be to eliminate scheduling conflicts between UIL events and the primary administration of statewide assessments. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463- 0028. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §38.0812, which requires the SBOE by rule to prohibit participation in a UIL area, regional, or state competition during the school week in which the primary administration of assessment instruments occurs.

The amendment implements the Texas Education Code, §38.0812.

§101.25. Schedule.

(a) The commissioner of education shall specify the schedule for testing and field testing that supports reliable and valid assessments.

(b) The superintendent of each school district or chief administrative officer of each charter school and any private school administering the tests as allowed under the Texas Education Code (TEC), §39.033, shall be responsible for administering tests.

(c) The commissioner of education may provide alternate dates for the administration of tests required for a high school diploma to students who are migratory children, as defined in the TEC, §39.029, and who are out of the state.

(d) Participation in University Interscholastic League area, regional, or state competitions is prohibited on any days on which testing is scheduled between Monday and Thursday of the school week in which the primary administration of assessment instruments under TEC, §39.023(a), (c), or (l) occurs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600979
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 475-1497

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CHAPTER 102. EDUCATIONAL PROGRAMS

SUBCHAPTER A. GRANTS

19 TAC §102.1

The State Board of Education (SBOE) proposes new §102.1, concerning the State Engineering and Science Recruitment Fund (SENSR) grant program. The proposed new section would establish provisions for the SENSR grant program relating to administration, allocation, application, use and audit of funds, and evaluation. Texas Education Code (TEC), §51.603 and §51.605, authorizes the SBOE to adopt rules establishing procedures by which an entity must apply for funding and account for any funds received. The TEC also requires the commissioner of education to administer and allocate the fund in accordance with SBOE rules.

The State Engineering and Science Recruitment Fund was created by the 70th Texas Legislature, 1987, through the TEC, Title 3, Higher Education, Chapter 51, Provisions Generally Applicable to Higher Education, Subchapter M, Engineering and Science Recruitment Fund. The SENSR grant has been administered by the Texas Education Agency (TEA), in collaboration with the Texas Higher Education Coordinating Board, through a request for application (RFA) for several years. Statute requires the SBOE to adopt rules for administration of the grant.

The proposed action would establish SBOE rule for procedures by which an entity must apply for funding and account for any funds received. The proposed new rule would establish provisions relating to administration, allocation, application, use and audit of funds, and evaluation. The proposed new rule would reflect the process that has been used to administer the SENSR grant program.

Susan Barnes, associate commissioner for standards and programs, has determined that for the first five- year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section. The new rule formalizes a process that has been in place for several years.

Dr. Barnes has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section would be the clarification of the guidelines for awarding the SENSR grant. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the new section.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463- 0028. All requests for a public hearing on the proposed new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new section is proposed under the Texas Education Code, §51.603, which authorizes the SBOE to adopt rules for the administration of the engineering and science recruitment fund and the TEC, §51.605, which authorizes the SBOE to adopt rules establishing procedures by which an entity must apply for funding and account for any funds received. The TEC also requires the commissioner of education to administer and allocate the fund in accordance with SBOE rules.

The new section implements the Texas Education Code, §§51.601-51.606, and 51.608.

§102.1. State Engineering and Science Recruitment Fund (SENSR) Grant Program.

(a) Purpose. In accordance with the Texas Education Code (TEC), Chapter 51, Subchapter M, the purpose of the State Engineering and Science Recruitment Fund (SENSR) grant program is to support the recruitment of women and minorities into engineering and science programs. The SENSR grant fund also provides assistance in preparing women and minorities for, or participating in, programs leading to an undergraduate degree in engineering or science from a university or college.

(b) Administration. The SENSR fund shall be administered by the commissioner of education as provided by the TEC, §51.603.

(c) Application. In order to participate in the SENSR program, eligible entities must submit an application in a format prescribed by the commissioner of education and by a date set by the commissioner in the application. The application must provide for an eligible entity to:

(1) demonstrate compliance with the criteria established in the TEC, §51.606(a);

(2) estimate the number of initial student participants;

(3) describe the organization's current or proposed methodology for maintaining records for tracking student progress between one project and another;

(4) describe how the projects interact with each other in moving female and/or underrepresented minority group students along a continuum of programs and into the disciplines in science, engineering, or mathematics related to science and engineering in institutions of higher education;

(5) describe techniques for sharing information about program experience, exemplary practices, etc., among the organization's various programs; and

(6) describe how the organization ensures that minority higher education institutions and community colleges are involved in the programs and how concentrations of disadvantaged youth may also be served.

(d) Allocation. As required in the TEC, §51.605, the SENSR fund shall be allocated by the commissioner of education in proportion to the percentage of women and underrepresented minority group students participating in eligible programs.

(1) For any program, funds provided may not exceed an amount designated by the commissioner of education or 50% of the contributions received by the program in the preceding fiscal year, whichever is less.

(2) Project funding for a subsequent year will be based on satisfactory progress of the previous year's objectives and activities and on general budget approval by the commissioner of education and the state legislature.

(3) Funds shall be allocated to programs that ensure compliance with criteria established in the TEC, §51.605(a).

(e) Use of funds. Funds may be requested only for those items that are reasonable and necessary for accomplishing the objectives of the program as defined in the program application. Funds granted through this project must be used for those purposes described in the application. Grant recipients may elect to use additional resources and other sources of financial support to help maximize the effectiveness of the project goals and objectives.

(f) Audit of funds. The Texas Education Agency may audit, disallow, and recover funds. A decision to award, audit, disallow, or recover funds by the commissioner or commissioner's designee is final.

(g) Evaluation. As part of its annual evaluation, required in the TEC, §51.608, each grant recipient must provide the following information in the format designated by the commissioner of education:

(1) data related to the recruitment efforts;

(2) the total number of students who actually participated in the program; and

(3) a final report on the use of funds and activities conducted, as well as information related to the achievement of the stated objectives.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.25

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §575.25, concerning Recommended Schedule of Sanctions.

The 79th Texas Legislature amended the Veterinary Licensing Act ("Act") to increase the maximum amount of administrative penalties that the Board can impose from $2500.00 for each violation not related to a controlled substance to $5000.00 per day for each violation of any kind. This section is proposed for amendment to update the Board's schedule of sanctions which is based on the amount specified in the Act.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section, except for the small additional amount of increased penalties that the Board will collect each year.

Mr. Allen has also determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the section will be to encourage licensee compliance with the Act and Board rules, thereby assuring the public that standards of the profession are being met. There will be no

effect on small or micro businesses. There will be no economic cost to persons required to comply with the amended section as proposed, except for the small number of licensees that may be required to pay enhanced penalties.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us, and will be accepted 30 days following publication in the *Texas Register*.

The amendments are proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer this chapter, and §801.401, which authorizes the Board to impose an administrative penalty.

The amendments affect the Veterinary Licensing Act, Occupations Code, Subchapter J, relating to administrative penalties.

§575.25. Recommended Schedule of Sanctions.

(a) Class A violations. Licensees considered as presenting imminent peril to the public will be considered Class A violators. In determining whether a violation is a Class A, consideration will be given to the disposition of any previously docketed cases, and to the combination of charges which might involve Class B and/or C violations.

(1) - (2) (No change.)

(3) Maximum penalties:

(A) (No change.)

(B) a penalty not exceeding $5,000 [~~$2,500~~] for each [~~non-drug~~] violation per day;

[~~(C) a penalty not exceeding $5,000 for each violation related to a controlled substances;~~]

(C) [~~(D)~~] continuing education in a specified field related to the practice of veterinary medicine that the board deems relevant to the violation(s). The total number of hours mandated are [~~not~~] in addition to the number of hours required to renew the veterinary license;

(D) [~~(E)~~] quarterly reporting certifying compliance with board orders.

(b) Class B violations. Involves licensees who have violated rules and/or statutes or have committed a Class C violation within the last 36-month period. In determining whether a violation is a Class B, consideration will be given to the disposition of the previously docketed cases, and to the combination of charges which might involve Class A and/or C violations.

(1) - (2) (No change.)

(3) Maximum penalties:

(A) one to 10-year license suspension with none, all, or part probated;

(B) a penalty not exceeding $5,000 [~~$2,500~~] for each violation per day;

[~~(C) a penalty not exceeding $5,000 for each violation related to a controlled substance~~]

(C) [~~(D)~~] continuing education in a specified field related to the practice of veterinary medicine that the board deems relevant to the violation(s). The total number of hours mandated are [~~not~~] in addition to the number of hours required to renew the veterinary license; and/or

(D) [~~(E)~~] quarterly reporting certifying compliance with board orders.

(c) Class C violations. Involve licensees who have violated the rules and/or statutes, but do not have a history of previous violations. Consideration should be given to the nature and severity of the violation(s).

(1) - (2) (No change.)

(3) Maximum penalties:

(A) (No change.)

(B) an administrative penalty not to exceed $500 for each violation per day.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

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Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: June 15, 2006
For further information, please call: (512) 305-7555

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22 TAC §575.27

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §575.27, concerning Complaints--Receipt, Investigation and Disposition.

The 79th Texas Legislature proposed several significant changes in the way the Board processes complaints. These changes are reflected in the proposed amended section. A complaint that involves medical expertise or judgment will be reviewed by two veterinarian Board members. For complaints not requiring medical expertise, a committee of the Board's staff is authorized to review and enter into a possible settlement of the complaint, which, in turn, must be approved by the Board. In informal conferences held to consider complaints involving medical expertise, two veterinarians and one public member of the Board must be present. The Board is also empowered to order restitution paid by the licensee to the complainant, not to exceed the amount the veterinary bill paid by the complainant, as part of a settlement.

Subsection (e) of the section has been re-written to clarify how cases involving unresolved complaints are referred to and heard by the State Office of Administrative Hearings ("SOAH"). In addition, to resolve a frequent question as to how complaints at SOAH should be handled when the complainant does not appear at a contested hearing, a new subsection has been added which requires that notice of a contested case hearing be sent to a licensee's last known address. If, after proper notice, the licensee fails to appear, the Board may ask the administrative law judge to issue a default proposal for decision in favor of the Board.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be fiscal implications for state government as a result of enforcing or administering the section. The fiscal implications of requiring two additional Board members to attend informal conferences in Austin will be approximately $18,660 per year in additional costs for travel, per diem and postage.

Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to increase the quality of decision making on complaints by having early review of complaints by additional Board members, and increase the efficiency of handling contested cases at SOAH. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us, and will be accepted for 30 days following publication in the *Texas Register*.

The amendments are proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Veterinary Licensing Act, Occupations Code, §§801.2055, 801.2056 and 801.408.

§575.27. Complaints--Receipt, Investigation and Disposition.

(a) - (b) (No change.)

(c) Investigation of complaints.

(1) - (7) (No change.)

(8) Upon the completion of an investigation, the director of enforcement shall present to the executive director a report of investigation (ROI) and a conclusion as to the probability that a violation(s) exists.

(A) If the executive director determines from the ROI that the probability of a violation involving medical judgment or practice exists, the director of enforcement shall forward a copy of the complaint file to the board secretary and another board member (the "veterinarian members")[,] who will determine whether or not the complaint should be closed [~~close~~], further investigation is warranted, or if the licensee should be invited to respond to the complaint at an informal conference at the board offices.

(B) If the probable violation does not involve medical judgment or practice, the executive director shall [~~not~~] forward the complaint file to a committee of [~~the board secretary, and~~] the executive director, director of enforcement, the investigator assigned to the complaint, and general counsel (the "staff committee"), which shall determine whether or not the complaint should be dismissed [~~closed~~], investigated further, [~~investigation is warranted,~~] or settled [~~if the licensee should be invited to respond to the complaint at an informal conference at the board offices~~].

(C) If the veterinarian members [~~board secretary or executive director~~] determine [~~determines~~] that a violation has not occurred, the executive director or director of enforcement shall notify the complainant and licensee in writing of the conclusion and that the complaint is dismissed.

(D) [~~(9)~~] If the veterinarian members [~~board secretary or executive director~~] conclude [~~concludes~~] that a probable violation(s) exists [~~does exist~~], the executive director shall invite the licensee in writing to an informal conference to discuss the complaint made against the licensee. If the veterinarian members cannot agree to dismiss or refer the complaint to an informal conference, the complaint will be automatically referred to an informal conference. The letter invitation to the licensee must include a list of the specific allegations of the complaint.

(E) A complaint considered by the staff committee shall be referred to an informal conference if:

(i) the staff committee determines that the complaint should not be dismissed or settled;

(ii) the staff committee is unable to reach an agreed settlement; or

(iii) the licensee who is the subject of the complaint requests that the complaint be referred to an informal conference.

(d) Informal conferences

(1) The informal conference is the last stage in the investigation of a complaint [~~process~~]. The licensee has the right to waive his or her attendance at the conference. The licensee may be represented by counsel.

(2) The board may be represented at the informal conference by a conference committee of the executive director, the veterinarian members and a public member of the board [~~board secretary~~] (if the complaint involves medical judgment or practice), the director of enforcement, the investigator assigned to the complaint, and the board's general [~~legal~~] counsel [~~and a public member of the board~~]. The complainant and the licensee and the licensee's legal counsel may attend the conference. Any other attendees are allowed at the discretion of the executive director. The executive director or the director of enforcement shall conduct the conference. [~~The board secretary, with the advice of the other members of the committee, determines the recommended disposition of a complaint involving medical judgement or practice.~~]

(3) Subject to the discretion of the executive director, the following procedure will be followed at the informal conference. The executive director shall explain the purpose of the conference and the rights of the participants, lead the discussion of [~~read~~] the allegations of the complaint, and explain the possible courses of action at the conclusion of the conference. The licensee will be asked to respond to the allegations. The complainant will be allowed to make comments relevant to the allegations. Comments of the licensee and complainant must be addressed to the person conducting the conference and not to each other. In the interest of maintaining decorum, the licensee or complainant may be asked to leave the room while the other is talking with the committee. The committee may ask questions of the licensee and complainant in order to fully develop the complaint record.

(4) At the conclusion of the informal conference, the conference committee [~~board secretary or executive director, as appropriate,~~] shall determine if a violation has occurred. If the conference committee [~~board secretary or executive director~~] determines that a violation has not occurred, the conference committee [~~board secretary or executive director~~] will dismiss the complaint, and will advise all parties of the decision and the reasons why the complaint was dismissed.

(5) If the conference committee [~~board secretary or executive director~~] determines that a violation has occurred and that disciplinary action is warranted, the [~~board secretary or~~] executive director will advise the licensee of the alleged violations and offer the li-

censee a settlement in the form of an agreed order that specifies the disciplinary action and monetary penalty. With the agreement of the licensee, the conference committee may recommend that the licensee refund an amount not to exceed the amount the complainant paid to the licensee instead of or in addition to imposing an administrative penalty on the licensee. The [~~board secretary or~~] executive director must inform the licensee that the licensee has a right to a hearing before an administrative law judge on the finding of the occurrence of the violation, the type of disciplinary action, and/or the amount of the recommended penalty.

(6) - (7) (No change.)

(e) Contested case [~~Administrative law~~] hearing

(1) If the licensee declines the board's settlement offer, or if the licensee fails to respond timely to the offer, or if the board rejects a proposed agreed order, the investigator of the complaint shall prepare a complaint affidavit containing the [~~complaint~~] allegations against the licensee. The signed and notarized complaint affidavit will then be reviewed by the board's legal counsel and signed by the executive director. The date the executive director signs the complaint affidavit is the official date of filing the complaint affidavit with the board. The complaint affidavit shall serve as the board's pleading in a contested case. At least ten (10) days prior to a scheduled hearing, the [~~The~~] complaint affidavit and notice of hearing shall be [~~is then~~] served on the licensee as set out in subsection (e)(3)(A) of this section [~~by certified mail or personal service at least ten (10) days prior to a scheduled hearing~~].

(2) The executive director shall submit to the State Office of Administrative Hearings (SOAH) a completed Request to Docket Case requesting SOAH to set a hearing and/or assign an administrative law judge to the contested case [~~complaint~~]. The board shall provide notice of the time, date, and place of the hearing to the licensee. Following issuance of a proposal for decision by the administrative law judge, the board by order may find that a violation has occurred and impose disciplinary action, or find that no violation has occurred. The board shall promptly advise the complainant of the board's action.

(3) Notice of SOAH hearing; continuance and default

(A) The board shall send notice of a contested case hearing before SOAH to the licensee's last known address as evidenced by the records of the board. Notice shall be given by first class mail, certified or registered mail, or by personal service.

(B) If the licensee fails to timely enter an appearance or answer the notice of hearing, the board is entitled to a continuance at the time of the hearing. If the licensee fails to appear at the time of the hearing, the board may move either for dismissal of the case from the SOAH docket, or request that the administrative law judge issue a default proposal for decision in favor of the board.

(C) Proof that the licensee has evaded proper notice of the hearing may also be grounds for the board to request dismissal of the case or issuance of a default proposal for decision in favor of the board.

(f) - (g) (No change.)

(h) Use of Private Investigators. The executive director may approve the use of private investigators to assist in investigation of complaints where the use of board investigators is not feasible or economical or where private investigators could provide valuable assistance to the board investigators. Private investigators may be utilized in cases involving honesty, integrity and fair dealing; reinstatement applications; solicitation; fraud; dangerous drugs and controlled substances; and practicing veterinary medicine without a license. Private investigators will be utilized in accordance with existing purchasing rules of the Texas Building and Procurement [~~General Services~~] Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200601032
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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22 TAC §575.31

The Texas Board of Veterinary Medical Examiners ("Board") proposes a new section §575.31 concerning Alternative Dispute Resolution (ADR). The 79th Texas Legislature amended the Veterinary Licensing Act to require the Board to develop and implement a policy encouraging the use of ADR to assist in the resolution of internal and external disputes. Other requirements were added, and the Board was directed to appoint a trained person to coordinate the implementation of the Board's ADR policy. The new section states the Board's policy as required by the statute, and appoints the Board's general counsel or his designee as the agency's dispute resolution coordinator (DRC). Requests for ADR must be addressed in writing to the DRC, and any costs associated with retaining a mediator or arbitrator shall be paid by the party requesting ADR. Any agreements resulting from ADR must be in writing and are enforceable as with any written contract.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the new section is in effect the public benefit anticipated as a result of enforcing the section will be to resolve disputes more quickly and impartially. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the section as proposed.

Comments on the proposed section may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us, and will be accepted for 30 days following publication in the *Texas Register*.

The section is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151 (a), which states that the Board may adopt rules necessary to administer the chapter. The amendments affect the Veterinary Licensing Act, Occupations Code, §801.162 relating to Alternative Rulemaking and Dispute Resolution Procedures.

§575.31. Alternative Dispute Resolution (ADR).

(a) The board's policy is to encourage the resolution and early settlement of internal and external disputes, including contested cases, through voluntary settlement processes, which may include any pro-

cedure or combination of procedures described by Chapter 154, Civil Practice and Remedies Code. Any ADR procedure used to resolve disputes before the board shall comply with the requirements of Chapter 2009, Government Code, and any model guidelines for the use of ADR issued by the State Office of Administrative Hearings.

(b) The board's general counsel or his designee shall be the board's dispute resolution coordinator (DRC). The DRC shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section;

(2) serve as a resource for any staff training or education needed to implement the ADR procedures; and

(3) collect data to evaluate the effectiveness of ADR procedures implemented by the board.

(c) The board, a committee of the board, a respondent in a disciplinary matter pending before the board, the executive director, or a board employee engaged in a dispute with the executive director or another employee, may request that the contested matter be submitted to ADR. The request must be in writing, be addressed to the DRC, and state the issues to be determined. The person requesting ADR and the DRC will determine which method of ADR is most appropriate. If the person requesting ADR is the respondent in a disciplinary proceeding, the executive director shall determine if the board will participate in ADR or proceed with the board's normal disciplinary processes.

(d) Any costs associated with retaining an impartial third party mediator, moderator, facilitator, or arbitrator, shall be borne by the party requesting ADR.

(e) Agreements of the parties to ADR must be in writing and are enforceable in the same manner as any other written contract. Confidentiality of records and communications related to the subject matter of an ADR proceeding shall be governed by §154.073 of the Civil Practice and Remedies Code.

(f) If the ADR process does not result in an agreement, the matter shall be referred to the board for other appropriate disposition.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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22 TAC §575.32

The Texas Board of Veterinary Medical Examiners ("Board") proposes a new section §575.32 concerning Negotiated Rulemaking. The 79th Texas Legislature amended the Veterinary Licensing Act to require the Board to develop and implement a policy encouraging the use of negotiated rulemaking procedures for the adoption of Board rules. Other requirements were added, and the Board was directed to appoint a trained person to coordinate the implementation of the policy. The new section states the Board's policy as required by the statute, and appoints the Board's general counsel or his designee as the agency's negotiated rulemaking coordinator (NRC) to coordinate the Board's rulemaking procedures, serve as a resource for any required staff training, and collect data to evaluate the effectiveness of negotiated rulemaking procedures implemented by the Board. The Board, the rules committee, or the executive director may direct the NRC to begin negotiated rulemaking procedures on a specified subject.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the new section is in effect the public benefit anticipated as a result of enforcing this section will be to streamline and make more efficient certain rulemaking procedures undertaken by the Board. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the section as proposed.

Comments on the proposes section may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us, and will be accepted for 30 days following publication in the *Texas Register*.

The section is proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151 (a), which states that the Board may adopt rules necessary to administer this chapter. The amendments affect the Veterinary Licensing Act, Occupations Code, §801.162 relating to Alternative Rulemaking and Dispute Resolution Procedures.

§575.32. Negotiated Rulemaking.

(a) The board's policy is to encourage the use of negotiated rulemaking for the adoption of board rules in appropriate situations.

(b) The board's general counsel or his designee shall be the board's negotiated rulemaking coordinator (NRC). The NRC shall perform the following functions, as required:

(1) coordinate the implementation of the policy set out in subsection (a) of this section, and in accordance with the Negotiated Rulemaking Act, Chapter 2008, Government Code;

(2) serve as a resource for any staff training or education needed to implement negotiated rulemaking procedures; and,

(3) collect data to evaluate the effectiveness of negotiated rulemaking procedures implemented by the board.

(c) The board, its rules committee, or the executive director may direct the NRC to begin negotiated rulemaking procedures on a specified subject.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200601034

Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7555

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER A. BOARD MEMBERS AND MEETINGS--DUTIES

22 TAC §577.2

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §577.2 concerning Meetings. The meetings of the Board are frequently recorded by members of the public. Section 551.023 of the Government Code authorizes agencies, for the purpose of maintaining order at meetings, to adopt reasonable rules for the placement of recording equipment and the manner in which the recording is conducted. In accordance with the statutory provision, the amended section authorizes the Board or executive director to direct an individual wishing to record or videotape a meeting as to the location, placement, or manner in which the recording is conducted.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the amended section is in effect the public benefit anticipated as a result of enforcing the section will be to encourage the efficient conduct of Board meetings while preserving the right of the public to record the proceedings. There will be no effect on small or micro businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, e-mail vet.board@tbvme.state.tx.us, and will be accepted for 30 days following publication in the *Texas Register*.

The amendments are proposed under the authority of the Veterinary Licensing Act, Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer this chapter.

The amendments affect the Veterinary Licensing Act, Occupations Code, Chapter 801.

§577.2. Meetings.

(a) - (c) (No change.)

(d) Recording of meetings

(1) A person may record all or part of the proceedings of a public Board meeting means of a tape recorder, video camera, or other means of audio or visual reproduction.

(2) In order to minimize disruption of the normal order of Board business, the executive director or Board president may direct any individual wishing to record or videotape the meeting as to equipment location, placement, and the manner in which the recording is conducted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601035
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Earliest possible date of adoption: June 15, 2006
For further information, please call: (512) 305-7555

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG

SUBCHAPTER N. CURRENT GOOD MANUFACTURING PRACTICE AND GOOD WAREHOUSING PRACTICE IN MANUFACTURING, PACKING, OR HOLDING HUMAN FOOD

25 TAC §§229.210 - 229.222

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §229.210 and amendments to §§229.211 - 229.222, concerning current good manufacturing and good warehousing practice in manufacturing, packing, or holding human food.

BACKGROUND AND PURPOSE

The new section and amendments are necessary to update current good manufacturing and good warehousing practice in manufacturing, packing, or holding human food in regards food safety during manufacturing and storage and distribution.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.211 - 229.222 have been reviewed and the department has determined the reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

A new §229.210, General Provisions, is added to provide clarification on the facilities subject to this subchapter. Amendments to §229.211 include the addition of new definitions. An amendment to §229.212 clarifies the reference of the U.S. Code of Federal Regulations. Section 229.213 is amended to reference employee health. Section 229.214 is amended to clarify what firms are exempt from these rules. Sections 229.215 and 229.220 reflect grammatical revisions. Section 229.216 is amended to clar-

ify language on pest activity, and to include specific language on approved pesticides. Section 229.217 is amended in several subsections to reflect grammatical revisions, suitable water temperature for hand-washing facilities, and clarification on waste and food waste operations. Section 229.218 is amended to provide clarification on the maintenance of instruments. Section 229.219 is amended in several subsections to include a reference for approved source, update the current cold holding temperature requirements for potentially hazardous foods, and to reflect extensive new language on reduced oxygen packaging. Section 229.221 is amended to add language on approved source, to clarify language on pest activity, and to update the current cold holding temperature for potentially hazardous foods. Section 229.222 is amended to clarify enforcement action on emergency orders and penalties.

FISCAL NOTE

Julie W. Loera, Manager, Foods Group, has determined that for each calendar year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Loera has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed These entities will not be required to alter their business practices in order to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Loera has also determined that for each of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public health benefits anticipated as a result of enforcing or administering the sections will be a safe food supply from manufacturers and distributors.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. " Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's rights to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Julie W. Loera., Manager, Foods Group, Texas Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6670 or by email to Julie.Loera@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new section and amendments are authorized by the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new section and amendments affect the Health and Safety Code, Chapters 431 and 1001; and Government Code, Chapter 531; and implements Government Code, §2001.039.

§229.210. General Provisions.

This subchapter applies to every person engaged in food manufacturing and/or wholesale food distribution regardless of the license or permit held under §§229.181 - 229.184, 229.370 - 229.374, and 229.541 - 229.554 of this title, or if the person is exempt from licensure. Retail food establishments, such as grocery stores and restaurants that are located outside the jurisdiction of a local health authority, must also comply with the requirements of §§229.161 - 229.171 and 229.173 - 229.175 of this title (Texas Food Establishment Rules) except for the manufacture or wholesale of food as defined by the Texas Food, Drug, and Cosmetic Act, Texas Health and Safety Code, §§431.221(2) and 431.221(3). Retail establishments that are located within the jurisdiction of a local health authority that permits and inspects retail food establishments and that are required to license as a food manufacturer under §§229.181 - 229.184 of this title, must also comply with the applicable rules enforced by the local health authority.

§229.211. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Those definitions and interpretations of terms of the Texas Food, Drug, and Cosmetic Act, Texas Health and Safety Code, Chapter 431 [~~Federal Food, Drug, and Cosmetic Act (the Act), §201~~], are also applicable when used in this subchapter.

(1) (No change.)

(2) Act--Texas [~~Federal~~] Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(3) - (14) (No change.)

(15) pH--(Potential of Hydrogen) A measure of the degree of the acidity or the alkalinity of a solution.

(16) Processing--Including, but not limited, to the preparing, blending, filtering, preserving, treating, changing into different market forms, manufacturing, packing, repacking, or labeling of food ingredients and or products.

(17) [~~(15)~~] Quality control operation--A planned and systematic procedure for taking all actions necessary to prevent food from being adulterated within the meaning of the Act.

(18) [~~(16)~~] Raw agricultural commodity--Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(19) Reduced oxygen packaging--The reduction of the amount of oxygen in a package by mechanically evacuating the oxygen; displacing the oxygen with another gas or combination of gases; or otherwise controlling the oxygen content in a package to a level below that normally found in the surrounding atmosphere, which is 21% oxygen. The term includes methods that may be referred to as altered atmosphere, modified atmosphere, controlled atmosphere, low oxygen, and/or vacuum packing including sous vide.

(20) [~~(17)~~] Rework--Clean, unadulterated food that has been removed from processing for reasons other than insanitary conditions or that has been successfully reconditioned by reprocessing and that is suitable for use as food.

(21) [~~(18)~~] Safe-moisture level--A level of moisture low enough to prevent the growth of undesirable microorganisms in the finished product under the intended conditions of manufacturing, storage, and distribution. The maximum safe moisture level for a food is based on its water activity (a_w). An (a_w) will be considered safe for a food if adequate data are available that demonstrate that the food at or below the given (a_w) will not support the growth of undesirable microorganisms.

(22) [~~(19)~~] Sanitization--The application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, yield a reduction of 5 logs, which is equal to a 99.999% reduction of representative disease microorganisms of public health importance.

(23) [~~(20)~~] Shall--Term to state mandatory requirements.

(24) [~~(21)~~] Should--Term to state recommended or advisory procedures or identify recommended equipment.

(25) [~~(22)~~] Water activity (a_w)--A measure of the free moisture in a food. The quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature.

§229.212. Current Good Manufacturing Practice.

(a) (No change.)

(b) Food subject to the requirements of these sections may also be subject to specific regulations [~~current good manufacturing practice regulation~~] found in Title 21, [~~the~~] Code of Federal Regulations (CFR), or in other sections of this title (25 Texas Administrative Code).

§229.213. Personnel.

The plant management shall take all reasonable measures and precautions to ensure the following:

(1) Disease control and employee health. Any person who, by medical examination or supervisory observation, is shown to have, or appears to have, an illness; open lesion, including boils, sores, or infected wounds; or any other abnormal source of microbial contamination by which there is a reasonable possibility of food, food-contact surfaces, or food-packaging materials becoming contaminated, shall be excluded from any operations which may be expected to result in such contamination until the condition is corrected. Personnel shall be instructed to report such health conditions to their supervisors.

(2) - (4) (No change.)

§229.214. Exclusions.

The following operations are not subject to this section: Establishments engaged solely in the harvesting, storage, or distribution of one or more raw agricultural commodities which are ordinarily cleaned and packed [~~cleaned, prepared, treated, or otherwise processed~~] before being marketed to the consuming public.

§229.215. Plant and Grounds.

(a) (No change.)

(b) Plant construction and design. Plant buildings and structures shall be suitable in size, construction, and design to facilitate maintenance and sanitary operations for food-manufacturing purposes. The plant and facilities shall:

(1) provide sufficient space for the [~~such~~] placement of equipment and storage of materials as is necessary for the maintenance of sanitary operations and the production of safe food;

(2) - (7) (No change.)

§229.216. Sanitary Operations.

(a) - (c) (No change.)

(d) Pest control.

(1) No pests shall be allowed in any area of a food plant. Guard or guide dogs may be allowed in some areas of a plant if the presence of the dogs is unlikely to result in contamination of food, food-contact surfaces, or food-packaging materials. Effective measures shall be taken to exclude pests from the processing areas and to protect against the contamination of food on the premises by pests. This exclusion of pests includes:

(A) no evidence of pest activity in non-food areas;

(B) no evidence of pest activity in food storage or food preparation areas; and

(C) no evidence of pest activity in or on food products, food packaging or food preparation utensils, equipment, or devices.

(2) Only pesticides approved by the Environmental Protection Agency (EPA) for use in a food processing facility may be used. Pesticides shall be used only according to label directions. Rodenticides shall be placed inside enclosed bait boxes or other approved receptacles. Only a licensed pesticide applicator may apply restricted use pesticides.

(3) The use of insecticides or rodenticides is permitted only under precautions and restrictions that will protect against the contamination of food, food-contact surfaces, and food-packaging materials.

(e) - (f) (No change.)

§229.217. Sanitary Facilities and Controls.

Each plant shall be equipped with adequate sanitary facilities and accommodations including, but not limited to:

(1) Water supply. The water supply shall be sufficient for the operations intended and shall be derived from an approved source.

(A) Requirements for approved source. Sources in Texas shall comply with the following requirements.

(i) Public water systems. Sources in Texas which are public water systems shall comply with the Texas Health and Safety Code, Chapter 341, Subchapter C, concerning drinking water standards and rules adopted [~~thereunder~~] by the Texas Commission on Environmental Quality [~~Texas Natural Resource Conservation Commission~~], 30 Texas Administrative Code (TAC), §§290.101 - 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems), and §§290.38 - 290.47 (relating to Rules and Regulations for Public Water Systems).

(ii) - (iii) (No change.)

(B) (No change.)

(C) Any water that is used for hand washing or contacts food or food-contact surfaces shall be safe and of sanitary quality for its intended use. Hot and cold running [~~Running~~] water at a suitable temperature, and under pressure as needed, shall be provided in all areas where required for the processing of food, for the cleaning of equipment, utensils, and food-packaging materials, or for employee sanitary facilities. Hot water generation and distribution systems shall be sufficient to meet peak hot water demands throughout the facility.

(2) - (4) (No change.)

(5) Hand-washing facilities. Hand-washing facilities shall be adequate in number and location and be furnished with: [~~running water at a suitable temperature. Compliance with this requirement may be accomplished by providing:~~]

(A) running water at a temperature of at least 110 degrees Fahrenheit;

(B) a supply of hand cleaning liquid, powder, or bar soap; and

(C) individual disposable towels, continuous towel system that supplies a user with a clean towel, or a heated-air hand drying device.

[~~(A) hand-washing and, where appropriate, hand-sanitizing facilities at each location in the plant where good sanitary practices require employees to wash and/or sanitize their hands;~~]

[~~(B) effective hand-cleaning and sanitizing preparations;~~]

[~~(C) sanitary towel service or suitable drying devices;~~]

[~~(D) devices or fixtures, such as water control valves, so designed and constructed to protect against recontamination of clean, sanitized hands;~~]

[~~(E) readily understandable signs directing employees handling unprotected food, unprotected food-packaging materials, or food-contact surfaces to wash and, where appropriate, sanitize their hands before they start work, after each absence from post of duty, and when their hands may have become soiled or contaminated. These signs may be posted in the processing room(s) and in all other areas where employees may handle such food, materials, or surfaces; and~~]

[~~(F) refuse receptacles that are constructed and maintained in a manner that protects against contamination of food.~~]

(6) Waste [~~Rubbish and offal disposal~~]. Waste [~~Rubbish and any offal~~] shall be so conveyed, stored, and disposed of as to minimize the development of odor; minimize the potential for the waste becoming an attractant and harborage or breeding place for pests; and protect against contamination of food, food-contact surfaces, water supplies, and ground surfaces, except as allowed in paragraph (7) of this section.

(7) Food waste. Bread, nonmeat pastry products, and produce that have been completely removed from all packaging may be disposed of by alternate means according to any applicable requirements of Title 30, Texas Administrative Code (TAC), Chapters 330, 332, and 335, or Title 4, TAC, Chapter 55.

§229.218. Equipment and Utensils.

(a) - (e) (No change.)

(f) Instruments and controls used for measuring, regulating, or recording temperatures, pH, acidity, water activity, or other conditions that control or prevent the growth of undesirable microorganisms in food shall be accurate and in sufficient quantity for their designated uses. The instruments shall be operated, maintained, and calibrated according to the manufacturer's directions. [~~and properly maintained, and in sufficient quantity for their designated uses.~~]

(g) (No change.)

§229.219. Production and Process Controls.

All operations in the receiving, inspecting, transporting, segregating, preparing, manufacturing, packaging, and storing of food shall be conducted in accordance with good public health and sanitation principles. Appropriate quality control operations shall be employed to ensure that food is suitable for human consumption and that food-packaging materials are safe and suitable. Overall sanitation of the plant shall be under the supervision of one or more competent individuals assigned responsibility for this function. All reasonable precautions shall be taken to ensure that production procedures do not contribute contamination from any source. Testing procedures shall be used where necessary to identify sanitation failures or possible food contamination by chemicals, microbes, or extraneous materials. All food that has become contaminated to the extent that it is adulterated within the meaning of the Act shall be rejected, or if permissible, treated or processed to eliminate the contamination.

(1) Raw materials and other ingredients.

(A) Food including raw ingredients and finished product shall be obtained from an approved source.

(B) [~~(A)~~] Raw materials and other ingredients shall be inspected and segregated or otherwise handled as necessary to ascertain that they are clean and suitable for processing into food and shall be stored under conditions that will protect against contamination and minimize deterioration. Raw materials shall be washed or cleaned as necessary to remove soil or other contamination. Water used for washing, rinsing, or conveying food shall be safe and of sanitary quality for its intended use. Water may be reused for washing, rinsing, or conveying food if it does not increase the level of contamination of the food. Containers and carriers of raw materials should be inspected on receipt to ensure that their condition has not contributed to contamination or deterioration of food.

(C) [~~(B)~~] Raw materials and other ingredients shall either: not contain levels of microorganisms that may produce food poisoning or other disease in humans; or they shall be pasteurized or otherwise treated during manufacturing operations so that they no longer contain levels that would cause the product to be adulterated within the meaning of the Act. Compliance with this requirement may be verified by any effective means, including purchasing raw materials and other ingredients under a supplier's guarantee or certification.

(D) [~~(C)~~] Raw materials and other ingredients susceptible to contamination with aflatoxin or other natural toxins shall comply with current Food and Drug Administration regulations, guidelines, and action levels for poisonous or deleterious substances before these materials or ingredients are incorporated into finished food. Compliance with this requirement may be accomplished by purchasing raw materials and other ingredients under a supplier's guarantee or certification, or may be verified by analyzing these materials and ingredients for aflatoxins and other natural toxins.

(E) [~~(D)~~] Raw materials, other ingredients, and rework susceptible to contamination with pests, undesirable microorganisms, or material shall comply with applicable Food and Drug Administration regulations, guidelines, and defect action levels for natural or unavoidable defects if a manufacturer wishes to use the materials in manufacturing food. Compliance with this requirement may be verified by any effective means, including purchasing the materials under a sup-

plier's guarantee or certification, or examination of these materials for contamination.

(F) [~~(E)~~] Raw materials, other ingredients, and rework shall be held in bulk, or in containers designed and constructed so as to protect against contamination and shall be held at a temperature and relative humidity and in a manner to prevent the food from becoming adulterated within the meaning of the Act. Material scheduled for rework shall be identified as such.

(G) [~~(F)~~] Frozen raw materials and other frozen ingredients shall be kept frozen. If thawing is required prior to use, it shall be done in a manner that prevents the raw materials and other ingredients from becoming adulterated within the meaning of the Act.

(H) [~~(G)~~] Liquid or dry raw materials and other ingredients received and stored in bulk form shall be held in a manner that protects against contamination.

(2) Manufacturing operations.

(A) - (B) (No change.)

(C) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at or below 41 degrees Fahrenheit as appropriate for the food using methods, that include refrigeration, pre-chilled insulated coolers, dry ice, or storage on ice made from potable water. The method used must maintain the required temperature for the entire length of time the food is in transport or storage.

[~~(C) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at 45 degrees Fahrenheit or lower as appropriate for the food.~~]

[~~(i)~~ ~~After October 5, 2003, the internal temperature of potentially hazardous foods shall be maintained at 41 degrees Fahrenheit or lower as appropriate for the food.~~]

(i) [~~(ii)~~] Frozen foods shall be kept frozen at all times.

(ii) [~~(iii)~~] Shell eggs, after initial packing, must be transported and stored at a temperature of 45 degrees Fahrenheit or less. If the United States Department of Agriculture and the U.S. Food and Drug Administration determine by law that a lower temperature must be maintained, the lower temperature shall prevail.

(iii) [~~(iv)~~] The temperature of molluscan shellfish [~~shellstock~~] from the harvester through the original shellfish dealer shall be maintained in accordance with §§241.58 - 241.60 of this title (relating to Molluscan Shellfish). Raw molluscan shellfish [~~shellstock~~] shall be adequately iced or refrigerated at 45 degrees Fahrenheit or less during all subsequent distribution, storage, processing, and sale.

(iv) [~~(v)~~] Hot foods shall be maintained at 135 [~~140~~] degrees Fahrenheit (60 degrees Celsius) or above.

(v) [~~(vi)~~] Acid or acidified foods shall be heat treated to destroy mesophilic microorganisms when those foods are to be held in hermetically sealed containers at ambient temperatures.

(D) - (O) (No change.)

(P) Reduced oxygen packaging. Manufacturers performing reduced oxygen packaging:

(i) shall maintain Standard Operating Procedures (SOPs) that:

(I) limit the shelf life of foods to not more than 14 calendar days from the date the food is packaged to the date the food is consumed or the original manufacturer's "sell by" or "use by" date, whichever comes first, except as described in clause (vi) of this subparagraph;

(II) Describe how the packages shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:

(-a-) "use by" and provide a date that is within 14 calendar days of packaging or provide a date as allowed by clause (v) of this subparagraph; and

(-b-) keep the food refrigerated at 41 degrees Fahrenheit or below;

(III) require employees that contact foods with bare hands to wash hands properly or utilize proper utensils;

(IV) designate raw food and ready to eat food areas and place physical barriers or effective methods that minimize the risk of cross-contamination between raw foods and ready-to-eat foods and restrict access to the food processing equipment to personnel who are trained to operate the equipment and understand the risks of cross-contamination;

(V) describe cleaning and sanitization procedures for food-contact surfaces; and

(VI) describe the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:

(-a-) concepts required for safe operation;

(-b-) equipment and facility; and

(-c-) procedures specified in clauses (i)(II)-(V) and (iii)-(vii) of this subparagraph;

(ii) shall maintain records that document employee training. Records documenting training must be maintained for at least one year after the employee leaves the company or is moved to other duties that do not include vacuum packaging. The records must be available at the packaging facility or corporate offices for review by the regulatory authority;

(iii) shall maintain food processing records for at least one year from the time the food is packed. The records must be available at the facility or corporate offices for review by the regulatory authority. The records must contain the following information:

(I) the identity of the food that is packaged;

(II) the date the food was packaged; and

(III) the name of the operator performing the food packaging; and

(iv) shall limit the types of foods that are packaged to a food that does not support the growth of *Clostridium botulinum* because it complies with one of the following:

(I) has a water activity (a_w) of 0.91 or less;

(II) has a hydrogen ion concentration (pH) of 4.6 or less;

(III) is a meat or poultry product cured at a food processing plant regulated by the U.S. Department of Agriculture or the department, and is received in an intact package; or

(IV) is a food with a high level of competing organisms such as raw meat or poultry.

(v) food products, other than those specified in clause (iv) of this subparagraph may be vacuum packaged if the firm provides written documentation of product testing such as shelf life studies of the product under the same storage and packaging

conditions or scientific studies of the product which must be the same species, market form, packaging, and holding conditions that prove the reduced oxygen packaged product will not support the growth of *Clostridium botulinum*;

(vi) the shelf life of a vacuum packaged product may be extended past the 14 day shelf life limit as specified in clause (i)(I) of this subparagraph if the firm provides written documentation of product testing such as shelf life studies of the product under the same storage and packaging conditions or scientific studies of the product which must be the same species, market form, packaging, and holding conditions that prove the extended shelf life of the reduced oxygen packaged product will not support the growth of *Clostridium botulinum*, *Listeria, and Salmonella*;

(vii) fish shall not be packaged in reduced oxygen packaging unless the fish is frozen before, during, and after packaging unless the firm is subject to §§229.121 - 229.129 of this title (relating to Seafood HACCP).

(Q) [~~(P)~~] Unshelled pecans shall be thoroughly cleaned to remove foreign matter before cracking. After cleaning, unshelled pecans shall be sanitized.

(R) [~~(Q)~~] When ice is used in contact with food, it shall be made from water that is safe and of adequate sanitary quality, and shall be used only if it has been manufactured in accordance with current good manufacturing practice as outlined in this part.

(S) [~~(R)~~] Food-manufacturing areas and equipment used for manufacturing human food should not be used to manufacture nonhuman food-grade animal feed or inedible products, unless there is no reasonable possibility for the contamination of the human food.

§229.220. Natural or Unavoidable Defects in Food for Human Use That Present No Health Hazard.

(a) - (c) (No change.)

(d) A compilation of the current defect action levels for natural or unavoidable defects in food for human use that present no health hazard may be obtained upon request from the Department of State Health Services [~~Texas Department of Health, Manufactured Foods Division~~], 1100 West 49th Street, Austin, Texas, 78756.

§229.221. Good Warehousing Practice.

(a) - (b) (No change.)

(c) Sanitary operations.

(1) (No change.)

(2) Food storage facilities and transportation vehicles shall be kept free of rodents, insects, birds, and other pests which may contaminate food which includes: [~~.~~]

(A) no evidence of pest activity in non-food areas;

(B) no evidence of pest activity in food storage areas; and

(C) no evidence of pest activity in or on food products, food packaging or food preparation utensils, equipment or devices.

(3) (No change.)

(4) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at or below 41 degrees Fahrenheit as appropriate for the food using methods that include refrigeration, pre-chilled insulated coolers, dry ice, or storage on ice made from potable water. The method used must maintain the required temperature for the entire length of time the food is in transport or storage.

[~~(4) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at 45degrees Fahrenheit or lower as appropriate for the food.~~]

[~~(A) After October 5, 2003, the internal temperature of potentially hazardous foods shall be maintained at 41 degrees Fahrenheit or lower as appropriate for the food.~~]

(A) [~~(B)~~] Frozen foods shall be kept frozen at all times.

(B) [~~(C)~~] Shell eggs after initial packing, must be transported and stored at a temperature of 45 degrees Fahrenheit or less. If the United States Department of Agriculture and the U.S. Food and Drug Administration determine by law that a lower temperature must be maintained, the lower temperature shall prevail.

(C) [~~(D)~~] The temperature of molluscan shellfish [~~shellstock~~] from the harvester through the original shellfish dealer shall be maintained in accordance with §§241.58-241.60 of this title (relating to Molluscan Shellfish). Raw molluscan shellfish [~~shellstock~~] shall be adequately iced or refrigerated at 45 degrees Fahrenheit or less during all subsequent distribution, storage, processing, and sale.

(5) - (11) (No change.)

(d) Other provisions.

(1) Distressed foods salvaged by the licensee shall be salvaged in accordance with §§229.541-229.554, 229.571-229.584, 229.601-229.614, and 229.631-229.647 [~~§§229.191 - 229.202~~] of this title (relating to Regulation of Food, Drug, Device, and Cosmetic Salvage Establishments and Brokers).

(2) - (3) (No change.)

(e) Food including raw ingredients and finished food products shall be obtained from an approved source.

§229.222. Enforcement [~~Penalties~~].

(a) - (b) (No change.)

(c) Administrative penalties as provided in Health and Safety Code §431.054, §431.055, §431.056, §431.057, §431.058, and in §229.261 of this title (relating to Assessment of Administrative [~~or Civil~~] Penalties), may be assessed for violation of these sections. If the person charged with the violation does not request a hearing, the Commissioner of the Department of State Health Services (Commissioner) or the Commissioner's designee may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(d) Emergency orders as provided in Health and Safety Code, §431.045, may be issued by the Commissioner or the Commissioner's designee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601024
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 458-7111 x6972

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PART 11. TEXAS CANCER COUNCIL

CHAPTER 703. PROJECT CONTRACTS AND GRANTS

25 TAC §§703.3, 703.5, 703.6, 703.10

The Texas Cancer Council proposes amendments to §§703.3, 703.5, 703.6, and 703.10, concerning the scope, project proposal submission, review process, and funding restrictions.

Sections 703.3, 703.5, and 703.6 are being amended to make the substitution of "application" for "proposal" consistent throughout the rules to more accurately reflect the proposal process used for Council grants.

Section 703.10 is being amended to conform to the Uniform Grant Management Standards, and clarifies the applicability of the restrictions that the Council previously adopted.

Ms. Sandra K. Balderrama, MPA, BSW, Executive Director of the Texas Cancer Council, has determined that for the first five-year period the amendments are in effect there will be no foreseeable implications relating to costs or revenues for state or local government as a result of enforcing or administering the amendments as proposed.

Ms. Balderrama also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be clarification of the policies and procedures the Council will follow to implement the *Texas Cancer Plan*. There are no anticipated economic costs to persons who are required to comply with the amendments.

Ms. Balderrama has determined that the amendments shall not have an effect on small businesses or on micro businesses.

Comments on the proposed amendments may be submitted to Ms. Sandra Balderrama, Executive Director, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711.

The amendments are proposed under the Texas Health and Safety Code Annotated, §102.002 and §102.009, which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, and the Texas Government Code, Annotated, §2001.004.

There is no other statute, article or code that is affected by these proposed amendments.

§703.3. Scope.

(a) (No change.)

(b) Sources.

(1) Grants to State of Texas agencies.

(A) - (B) (No change.)

(C) State agencies may respond to the request-for-proposals [~~applications~~] that will be published from time to time in the *Texas Register*.

(2) Grants to non-state or private organizations. The council may solicit public and private entities to submit proposals in response to a request-for-proposals [~~applications~~] that may be published from time to time in the *Texas Register*. The Council may also accept unsolicited proposals from non-state and private sector applicants.

(c) (No change.)

§703.5. Project Proposal Submission.

(a) - (d) (No change.)

(e) Proposals that are late, are grossly incomplete, or substantially inconsistent with the project components and requirements outlined in the council's published request-for-proposals [~~applications~~] will not be accepted and will be returned to the applicant with an explanation of deficiencies.

§703.6. Review Process.

(a) Each proposal shall be reviewed by council staff for completeness, relevance to the published request-for-proposals [~~application~~] adherence to council policies, technical merit, and budget appropriateness. Staff analyses of each eligible proposal received will be prepared and submitted to the council before the council makes a funding decision.

(b) - (e) (No change.)

§703.10. Funding Restrictions.

Contractors will be subject to the following funding restrictions, unless statute or Council rules require otherwise:

(1) - (2) (No change.)

(3) Unallowable [~~Disallowable~~] costs.

(A) The following is a list of the most common types but not a comprehensive list of costs which are unallowed [~~disallowed~~]:

(i) - (x) (No change.)

(B) (No change.)

(4) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 23, 2006.

TRD-200600958
Sandra Balderrama
Executive Director
Texas Cancer Council
Proposed date of adoption: May 5, 2006
For further information, please call: (512) 438-3029

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CHAPTER 704. TEXANS CONQUER CANCER PROGRAM

25 TAC §704.5, §704.7

The Texas Cancer Council proposes amendments to §704.5. and §704.7, concerning guidelines for expenditures, and guidelines for awarding support services funds.

In §704.5 the word "grantee" is changed to "applicant" to clarify the status of entity applying for funds.

Section 704.7 is being amended to reflect the updated version of the application form that must be used for the submission of grant proposals, and ensures greater consistency and objectivity in proposal review.

Ms. Sandra K. Balderrama, MPA, BSW, Executive Director of the Texas Cancer Council, has determined that for the first five-year period the amendments are in effect there will be no foreseeable implications relating to costs or revenues for state or local

government as a result of enforcing or administering the amendments.

Ms. Balderrama also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be clarification of the policies and procedures the Council will follow to implement the *Texas Cancer Plan*. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Ms. Balderrama has determined that the amendments shall not have an effect on small businesses or on micro businesses.

Comments on the proposed amendments may be submitted to Ms. Sandra Balderrama, Executive Director, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711.

The amendments are proposed under the Texas Health and Safety Code Annotated, §102.002 and §102.009, which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, and the Texas Government Code, Annotated, §2001.004.

There is no other statute, article or code that is affected by these proposed amendments.

§704.5. Guidelines for Expenditures.

(a) The council, with advice from the TCCAC, shall establish guidelines for awarding the funds in the TCCA. The guidelines shall be referred to as the "Guidelines for Awarding Support Services Funds."

(b) As described in §704.7 of this chapter, the "Guidelines for Awarding Support Services Funds" are to assist applicants by clarifying guidelines and procedures related to the Texans Conquer Cancer awards. The document is published by and available from the Texas Cancer Council, P.O. Box 12097, Austin, TX 78711 and when funds are available on the agency website at www.tcc.state.tx.us.

§704.7. Guidelines for Awarding Support Services Funds.

(a) - (e) (No change.)

(f) Application Requirements.

(1) The council adopts by reference an application form entitled "Texans Conquer Cancer Patient Support Services Application (2006 [~~2003~~])". This form is available from the council office.

(2) Applicants must follow the format of the "Texans Conquer Cancer Patient Support Services Application (2006 [~~2003~~])" form.

(3) (No change.)

(g) - (k) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 23, 2006.

TRD-200600959
Sandra Balderrama
Executive Director
Texas Cancer Council
Proposed date of adoption: May 5, 2006
For further information, please call: (512) 438-3029

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 11. CONTRACTS

SUBCHAPTER D. RESOLUTION OF CONTRACT CLAIMS

30 TAC §§11.103 - 11.105, 11.108

The Texas Commission on Environmental Quality (commission) proposes amendments to §§11.103 - 11.05 and 11.108.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill (HB) 1940, 79th Legislature, 2005, amended Texas Government Code, §2260.051(d), Claim for Breach of Contract; Notice, and §2260.052(a), Negotiation, by reducing the amount of time by which units of state government must file a counterclaim against a contractor from 90 days to 60 days after receiving notice of the claim from the contractor, and modifying the time by which units of state government must enter into negotiations with the contractor to 120 days after the date the claim is received.

The purpose of the proposed rulemaking is to amend Chapter 11 to implement HB 1940. Additionally, the commission proposes the amendments to §11.103 and §11.108 to conform to Texas Register requirements.

SECTION BY SECTION DISCUSSION

The proposed amendment to §11.103, Other Rules and Statutes, corrects the section title of a reference to conform to Texas Register requirements.

The proposed amendment to §11.104, Filing Notice of Claim for Breach of Contract; Counterclaim, changes the time in which the executive director must file a counterclaim from 90 days to 60 days after receiving the notice of claim from the contractor. At the time of the adoption of the rule on August 20, 2000, a unit of state government had 90 days after receiving the notice of claim in which to file a counterclaim. The proposed amendment to §11.104 would also spell out the acronym "OLS" to conform to Texas Register requirements.

The proposed amendment to §11.105, Negotiation, deletes the language that states that the executive director, upon receiving the claim, shall provide the contractor a reasonable opportunity to meet and negotiate the claim. The proposed amendment to §11.105 also specifies that the executive director must begin negotiations within 120 days after receiving notice of the claim by the contractor.

The proposed amendment to §11.108, Request for Hearing, would spell out the acronyms "SOAH" and "OLS" to conform to Texas Register requirements.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Walter Perry, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed amendments are in effect, no significant fiscal implications are anticipated for the commission or other units of state or local government.

The proposed rules implement HB 1940, which amended Texas Government Code, Chapter 2260. The bill addresses the resolution of certain contract claims against the state. The proposed rulemaking would reduce the time by which the commission must file a counterclaim from 90 days to 60 days after receiving notice of the claim from the contractor. The commission would also be required to enter into negotiations with a contractor within 120 days after receiving notice of the claim by the contractor. These proposed changes are not anticipated to have significant fiscal implications for the commission.

The proposed rules are specific to anyone who directly enters into a contract with the commission. Units of local government who enter into a contract directly with a unit of state government would be subject to the proposed rules and as such may benefit from the reduced time frame to resolve claims, though cost savings, if any, are not expected to be significant.

PUBLIC BENEFITS AND COSTS

Mr. Perry also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law.

The proposed rulemaking would reduce the time by which the commission must file a counterclaim from 90 days to 60 days after receiving notice of the claim from the contractor. The commission would also be required to enter into negotiations with a contractor within 120 days after receiving notice of the claim by the contractor.

No significant fiscal implications are anticipated for businesses and individuals as a result of the proposed rules. The proposed rules would reduce the time frame for the resolution of claims against a unit of state government.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Small and micro-businesses would experience the same benefits as larger businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the proposed rulemaking is to reduce the time in which a unit of state government must file a counterclaim against a contractor and the time in which to enter negotiations. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to provide the time frame in which units of government must file a counterclaim against a contractor and enter into negotiations to resolve certain contract claims. The proposed rules will substantially advance this stated purpose.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these proposed rules affect the time frame in which units of state government must file a counterclaim and enter into negotiations in order to resolve certain contract claims. There are no burdens imposed on private real property, and the benefits to society are the efficient resolution of contract claims against a unit of state government.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-13087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-071-011-LS. Comments must be received by 5:00 p.m., April 10, 2006. For further information, please contact Evelyn Njuguna, General Law Division, (512) 239-0688.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Water Code, §5.103, Rules, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Water Code and any other laws of the State of Texas, and the Texas Government Code, §2260.052(c), Negotiation, which gives each unit of state government with rulemaking authority the authority to develop rules to govern the negotiation and mediation of a claim.

The proposed amendments implement Texas Government Code, §2260.051(d), Claim for Breach of Contract; Notice, and §2260.052(a), Negotiation.

§11.103. Other Rules and Statutes.

The requirements of the following statutes and rules also apply to claims filed under this subchapter:

(1) (No change.)

(2) Section 1.10 and §1.11 of this title (relating to [~~regarding~~] Document Filing Procedures; and Service on Judge, Parties, and Interested Persons) except §1.11(a) of this title.

§11.104. Filing Notice of Claim for Breach of Contract; Counterclaim.

A contractor asserting a claim that the agency has breached a contract must file a notice of claim as follows.

(1) - (2) (No change.)

(3) Copies of the written notice of claim and all other documents filed with the chief clerk must be served on the executive director and the deputy director of Office of Legal Services [~~OLS~~] no later than the day of filing.

(4) The executive director shall file any appropriate counterclaim with the chief clerk within 60 [~~90~~] days after the filing of the notice of claim and provide a copy to the contractor.

§11.105. Negotiation.

(a) (No change.)

(b) The executive director shall initiate negotiations with the contractor within 120 days after receiving the notice of claim [~~Upon receiving a notice of claim, the executive director shall provide the contractor a reasonable opportunity to meet and negotiate the claim~~].

(c) (No change.)

§11.108. Request for Hearing.

(a) A contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) [~~state SOAH~~] of any unsettled portion of the claim.

(b) - (c) (No change.)

(d) A contractor must serve copies of the request for hearing on the executive director and the deputy director of Office of Legal Services [~~OLS~~] no later than the day of filing.

(e) After a contractor files the request for hearing, the chief clerk shall refer the entire file on the claim and counterclaim to [~~the~~] SOAH for a contested case hearing under Texas Government Code, Chapter 2001, as to the issues raised in the request for hearing. Referral of a request for hearing to SOAH does not constitute waiver by the commission of statutory or regulatory requirements for the notice of claim, the claim or the request for hearing.

(f) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600997
Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 239-6087

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CHAPTER 35. EMERGENCY AND TEMPORARY ORDERS AND PERMITS; TEMPORARY SUSPENSION OR AMENDMENT OF PERMIT CONDITIONS

SUBCHAPTER K. AIR ORDERS

30 TAC §§35.801, 35.802, 35.804, 35.805, 35.807, 35.808

The Texas Commission on Environmental Quality (commission) proposes amendments to §§35.801, 35.802, 35.804, 35.805, 35.807, and 35.808.

The amended sections will be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

House Bill (HB) 2949, 79th Legislature, 2005, amended Texas Water Code (TWC), §5.515, to allow for authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The TWC previously only authorized emergency orders to allow repair of a facility or control equipment. Amended TWC, §5.515 adds language regarding the contents of the application for an emergency order. The required language in the application pertaining to the reason for allowing the construction and emissions was expanded to include preventing a "loss of a critical transportation thoroughfare." The purpose of this rulemaking is to reflect these changes in Subchapter K of this chapter. Because the statute is self-implementing, an emergency order could currently be issued for one of the previously described instances prior to the adoption of these proposed rules.

The proposed rules would add language authorizing emergency orders to include repair or replacement of roads, bridges, or other infrastructure improvements to the list of actions that can be authorized by an emergency order. Additionally, the proposed rules would authorize an applicant to list loss of a critical transportation thoroughfare as a reason why the construction and emissions are essential. As a point of clarification, it is noted that the issuance of an emergency order, under the proposed rules, to a rock crusher or concrete batch plant that performs wet batching, dry batching, or central mixing will not be prohibited under TWC, §5.5145, or subject to penalty under TWC, §7.052(b), because the facility is considered to be operating under a temporary permit as provided in TWC, §5.501(a)(2)(A).

SECTION BY SECTION DISCUSSION

The commission proposes administrative changes throughout the rules to conform with Texas Register requirements and agency guidelines.

The proposed amendment to §35.801, Emergency Orders Because of Catastrophe, adds roads, bridges, or other infrastructure to the list of repairs or replacements for which the commission may authorize immediate action. The commission also proposes to revise the definition of catastrophe by replacing the word "operator" with the word "applicant" and by adding the language "or a road, bridge, or other infrastructure."

The proposed amendment to §35.802, Application of an Emergency Order, adds language, in paragraphs (1) and (5), allowing an applicant to state that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible statements in an application for an emergency order of why the construction and emissions are necessary. In describing the limitations on the proposed construction and emissions, the applicant may cite the public works project as the specific basis for the emergency authorization.

The proposed amendment to §35.804, Issuance of Order, adds language, in paragraph (1), allowing the commission to issue an order under this subchapter if it is found that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible reasons that would allow the commission to issue an emergency order. Proposed new §35.804(5)(C), adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.805, Contents of an Emergency Order, adds in paragraph (3), public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.807, Affirmation of an Emergency Order, adds language, in paragraph (1), allowing the commission to affirm a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure to the list of possible reasons that would allow the commission to issue an emergency order. Proposed new §35.807(5)(C) adds public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe to the list of limitations of the proposed construction and emissions.

The proposed amendment to §35.808, Modification of an Emergency Order, adds language, in paragraph (1), allowing the commission to modify a proposed or issued order under this subchapter if the applicant shows that the proposed construction and emissions are essential to prevent the loss of a critical transportation thoroughfare, and that the construction and emissions are necessary for the repair or replacement of roads, bridges, or other infrastructure.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government.

The proposed rules allow for the authorization of emergency orders to repair or replace roads, bridges, or other infrastructure improvements involving public works projects destroyed during a catastrophe. The rulemaking is consistent with HB 2949. The TWC previously only authorized emergency orders to allow the repair of a facility or control equipment. The proposed rules would add language authorizing emergency orders for the repair or replacement of roads, bridges, or other infrastructure improvements. Additionally, the proposed rules would authorize an applicant to list loss of a critical thoroughfare as a reason why the proposed construction and emissions are essential.

In general, the proposed rules are expected to affect rock crushers and concrete batch plants in that the proposed emergency order could authorize any air emissions or other activities necessary to repair or replace infrastructure in the event of a catastrophic event. No costs are anticipated for the agency to implement the proposed rules, and no fiscal implications are anticipated for other units of state or local government due to the enforcement or administration of the proposed rules.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, and the expedited rebuilding or repair of critical infrastructure in the event of a catastrophe. The proposed rules would authorize emergency orders that previously would not have been allowed under commission rules. Allowing another category of emergency orders would permit industry to respond more quickly to catastrophes that affect major infrastructure. The emergency order could authorize any air emissions or other activities from rock crushers and concrete batch plants to repair or replace any necessary infrastructure. Because the amended statute is self-implementing, an emergency order could currently be issued prior to the adoption of these proposed rules. No fiscal implications are anticipated for businesses or industry due to the implementation of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that own or operate rock crushers or concrete batch plants. The proposed rules would authorize emergency orders that previously would not have been allowed under commission rules and are expected to permit industry to respond more quickly to catastrophes that affect major infrastructure.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission has determined that the proposed rulemaking does not fall under the definition of a "major environmental rule" because none of the proposed rules mandate new requirements for the regulated community. Rather, the proposed rules are intended to reflect the statutory changes made to TWC, §5.515, by HB 2949.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or

4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law under TWC, Chapter 5, Subchapter L; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §5.515.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to incorporate into commission rules the changes made to TWC, §5.515, by the Texas Legislature by adding language to authorize emergency orders in the event of a catastrophe to include the repair or replacement of roads, bridges, or other infrastructure.

Promulgation and enforcement of the proposed amendments would constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking because the proposed amendments neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking. None of the proposed rules mandate any new requirements, but rather, provide for a specific type of authorization.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to the emission of air pollutants. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders for the repair or replacement of roads, bridges, or other infrastructure when necessitated by a catastrophe, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances such as potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 4, 2006, at 10:00 a.m. in Building B, Room 201A, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, a staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lola Brown, Office of Legal Services at (512) 239-0348. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Texas Register Team, Office of Legal Services, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. All comments should reference Rule Project Number 2005-070-035-LS. Comments must be received by 5:00 p.m., April 10, 2006. For further information, please contact Les Trobman, Environmental Law Division, (512) 239-6056.

STATUTORY AUTHORITY

These amendments are proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules to carry out its duties under the TWC and the other laws of the state; §5.105, which establishes the commission's authority to set policy by rule; and §5.515, which allows the commission to issue emergency orders for immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act (TCAA).

The proposed amendments implement changes made by the Texas Legislature to TWC, §5.515.

§35.801. Emergency Orders Because of Catastrophe.

The commission or executive director may issue emergency orders under Texas Water Code, §5.515, to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, or the repair or replacement of roads, bridges, or other infrastructure, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act [~~TCAA~~]. For purposes of this section, a catastrophe is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the applicant [~~operator~~], which renders a facility or its functionally related appurtenances, or a road, bridge, or other infrastructure, inoperable.

§35.802. Application for an Emergency Order.

The owner or operator of a facility, as that term is defined in Texas Health and Safety Code, §382.003, desiring to obtain an order under this subchapter shall submit an application in accordance with §35.24

of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) a statement that the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions, and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, necessitated by a catastrophe;

(2) - (4) (No change.)

(5) a statement that the proposed construction and emissions will occur only:

(A) on [~~at~~] the property where the catastrophe occurred;

(B) [~~or~~] on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided [~~providing~~] that no more than a *de minimus* [~~de minimis~~] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) - (10) (No change.)

§35.804. Issuance of Order.

The commission or executive director may issue an order under this subchapter if it is found that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (4) (No change.)

(5) the proposed construction or emissions will occur only:

(A) on [~~at~~] property where the catastrophe occurred; [~~or~~]

(B) on [~~at~~] other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that [~~so long as there will be~~] no more than a *de minimus* [~~de minimis~~] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(6) - (7) (No change.)

§35.805. Contents of an Emergency Order.

In addition to the requirements of §35.26 of this title (relating to Contents of Emergency or Temporary Order), an emergency order issued under this subchapter shall contain at least the following:

(1) - (2) (No change.)

(3) authorization for action only:

(A) on [~~at~~] the property where the catastrophe occurred;

(B) [~~or~~] on other property owned by the owner or operator of the damaged facility, which [~~also~~] produces the same intermediates, products, or by-products, provided that [~~there will be~~] no more than a *de minimus* [~~de minimis~~] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during a catastrophe;

(4) (No change.)

(5) a schedule for submission of a complete construction permit application under provisions of Texas Clean Air Act [~~TCAA~~], Chapter 382 [~~§382.0518~~].

§35.807. Affirmation of an Emergency Order.

The commission shall affirm a proposed or issued order if the applicant shows at the hearing, by a preponderance of the evidence, that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (4) (No change.)

(5) the proposed construction or emissions will occur only:

(A) on [~~at~~] property where the catastrophe occurred; [~~or~~]

(B) on [~~at~~] other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, provided that [~~so long as there will be~~] no more than a *de minimus* [~~de minimis~~] increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property; or

(C) for public works projects needed to rebuild or repair damaged roads, bridges, or other infrastructure destroyed during the catastrophe;

(6) - (7) (No change.)

§35.808. Modification of an Emergency Order.

The commission shall modify a proposed or issued order if the hearing record shows that:

(1) construction and emissions otherwise precluded under the Texas Clean Air Act [~~TCAA~~] are essential to prevent loss of life, serious injury, severe property damage, loss of a critical transportation thoroughfare, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment, or repair or replacement of roads, bridges, or other infrastructure, that is necessitated by a catastrophe;

(2) - (3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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CHAPTER 291. UTILITY REGULATIONS
SUBCHAPTER J. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

30 TAC §291.146

The Texas Commission on Environmental Quality (commission or TCEQ) proposes new §291.146.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The 79th Legislature, 2005, passed House Bill (HB) 841, which relates to municipally owned utilities that provide nonsubmetered master metered utility service to recreational vehicle parks. HB 841 amended Texas Water Code (TWC), §13.087, by defining "nonsubmetered master metered utility service" and by requiring municipally owned utilities to determine rates charged to recreational parks in the same manner as they do for other commercial businesses that serve transient customers.

This bill requires the commission to incorporate into the agency's rules the definition of "nonsubmetered utility service" and to review complaints received by recreational vehicle parks. This bill also gives the commission the authority to take enforcement action against a municipally owned utility that charges a higher rate to a recreational vehicle park than to a commercial customer.

SECTION DISCUSSION

The commission proposes to add new §291.146, Municipal Rates for Certain Recreational Vehicle Parks, to implement TWC, §13.087, as amended by the 79th Legislature. This proposed new section defines "nonsubmetered master metered utility service" as potable water service that is master metered but not submetered and wasterwater service that is based on master metered potable water service. The proposed new section gives the commission enforcement authority over municipally owned utilities that do not determine rates charged to recreational parks in the same manner as they do for other commercial businesses that serve transient customers.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Walter Perry, Analyst, Strategic Planning and Assessment Section, determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government.

The proposed rule implements HB 841, 79th Legislature, which requires all municipally owned utilities that provide nonsubmetered master metered utility service to recreational vehicle parks to determine their rates for recreational vehicle parks in the same manner used for other commercial businesses that serve transient customers. The rulemaking would grant jurisdiction to the agency to take enforcement action against a municipally owned utility that charges a higher rate to a recreational vehicle park than to similar commercial customers. The rulemaking defines nonsubmetered utility service as potable water service that is master metered but not submetered and wastewater service that is based on master metered potable water service.

The rulemaking would not affect agency revenues or costs. The agency would be required to review complaints received from recreational vehicle parks and take any necessary enforcement action. Any additional costs for the agency to review complaints or take enforcement action would be absorbed using current agency resources. Other units of state government are not expected to be affected by the proposed rule as they do not own or operate municipal water utilities. Local governments that own their own municipal water utilities would be prevented from charging recreational vehicle parks rates that are different from similar businesses. Of the estimated 1,920 cities in Texas, approximately 962 have a municipally owned utility. Any reduction in revenue for the utilities is not projected to be significant. Any reduction in revenue would be dependent upon the level of water consumption and the current disparity between rates charged for the recreational vehicle parks and similar businesses that serve transient customers. It is unknown how many recreational vehicle parks are located in areas serviced by municipal water utilities.

PUBLIC BENEFITS AND COSTS

Mr. Perry also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be billing rate protection for recreational vehicle parks serviced by municipal water utilities. The commission would be granted enforcement authority to ensure that recreational vehicle parks are billed at the same rates as similar businesses that serve transient customers.

The proposed rule implements HB 841, 79th Legislature, which requires all municipally owned utilities that provide nonsubmetered master metered utility service to recreational vehicle parks to determine their rates for recreational vehicle parks in the same manner used for other commercial businesses that serve transient customers. The rulemaking would grant jurisdiction to the agency to take enforcement action against a municipally owned utility that charges a higher rate to a recreational vehicle park than to similar commercial customers. The rulemaking defines nonsubmetered utility service as potable water service that is master metered but not submetered and wastewater service that is based on master metered potable water service.

The proposed rule is expected to result in cost savings for any recreational vehicle park serviced by a municipally owned water utility. Of the estimated 1,920 cities in Texas, approximately 962 have a municipally owned utility. It is unknown how many recreational vehicle parks are located in areas serviced by municipal water utilities. It is projected that the rulemaking would protect the recreational vehicle parks from being charged rates that are higher than other similar businesses and could result in financial savings for the affected recreational vehicle parks. Any savings realized would be dependent upon consumption and the current disparity between rates charged for the recreational vehicle parks and similar businesses that serve transient customers.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking would result in no additional costs for small and micro-businesses. Small and micro-businesses would experience the same potential cost savings as industry. It is believed that the majority of businesses that own and

operate recreational vehicle parks and would be affected by the rulemaking are small and micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This proposal does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure. The specific purpose of this rulemaking is to amend the commission rules in Chapter 291 to incorporate the requirements of HB 841 from the 79th Legislature, related to the rates charged by a municipally owned utility to certain recreational vehicle parks for potable water or wastewater service. The proposed rule incorporates the requirement in HB 841 that a municipally owned utility determine the rates for nonsubmetered master metered utility service to a recreational vehicle park on the same basis the utility uses to determine the rates for other commercial businesses. The requirements of HB 841 relate to the utility rates charged by a municipally owned utility and are not related to environmental protection or the reduction of risk to human health.

Furthermore, even if the proposed rulemaking did meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Specifically, the proposed rule does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission invites public comment on the draft regulatory analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to amend the commission rules in Chapter 291 to incorporate the requirements of HB 841 from the 79th Legislature, related to the rates charged by a municipally owned utility to certain recreational vehicle parks for potable water or wastewater service. The proposed rule would substantially advance this stated purpose by incorporating the requirements of HB 841 related to municipal utility rates into the commission rules. There are no burdens imposed on private real property by the enactment of the rule because the rule addresses municipal utility rates and does not affect private real property. Therefore, the proposed rule does not constitute a takings under Texas Government Code, Chapter 2007.

The commission invites public comment on this preliminary takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Holly Vierk, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-059-291-PR. Comments must be received by 5:00 p.m., April 10, 2006. For further information, please contact Lisa Mejia, Utilities & Districts Section, (512) 239-6117.

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.102, which provides the commission the general powers to carry out duties under TWC; and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041, states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13, or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041, states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.087, the section added by HB 841, states that the commission has jurisdiction to enforce this section.

The proposed new rule implements TWC, §§5.102, 5.103, 13.041, and 13.087.

§291.146. Municipal Rates for Certain Recreational Vehicle Parks.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) Nonsubmetered master metered utility service--Potable water service that is master metered but not submetered and wastewater service that is based on master metered potable water service.

(2) Recreational vehicle--Includes a:

(A) house trailer as that term is defined by Texas Transportation Code, §501.002; and

(B) towable recreational vehicle as that term is defined by Texas Transportation Code, §541.201.

(3) Recreational vehicle park--A commercial property on which service connections are made for recreational vehicle transient guest use and for which fees are paid at intervals of one day or longer.

(b) A municipally owned utility that provides nonsubmetered master metered utility service to a recreational vehicle park shall determine the rates for that service on the same basis the utility uses to determine the rates for other commercial businesses, including hotels and motels, that serve transient customers and receive nonsubmetered master metered utility service from the utility.

(c) With the exception of any other provision of this chapter, the commission has jurisdiction to enforce this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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CHAPTER 295. WATER RIGHTS, PROCEDURAL

The Texas Commission on Environmental Quality (commission) proposes amendments to §§295.2 and 295.171 - 295.174; and proposes new §295.42.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 79th Legislature, 2005, passed House Bill (HB) 2140. This proposed rulemaking is necessary to implement that bill. This proposed rulemaking is also necessary to update the rules to reflect the agency's current practices, to adhere to the style and formatting requirements in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register and agency guidelines.

When an application is filed to construct a storage reservoir, Texas Water Code (TWC), §11.124, as amended by HB 2140, requires that the application contain evidence that notice of the application has been given to members of the governing bodies of each county and municipality in which the reservoir will be located. The rule and statute ensure that local elected officials are provided timely information on reservoirs that are proposed for their area.

A corresponding proposed rulemaking that includes changes to 30 TAC Chapter 297, Water Rights, Substantive, is published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

The proposed amendment to §295.2, Preparation of Application, adds a provision that the applicant must submit one original and six copies of the application and supporting materials, with a provision that electronic versions can be submitted for copies with the approval of the executive director. Some applicants have suggested to staff that the applicants may not provide the customary copies. In order to ensure timely processing of applications it is especially important for the staff to have copies of maps and other exhibits that cannot be readily copied by staff.

Proposed new §295.42, Additional Notice Requirements, requires proof of mailed notice of the application for a proposed storage reservoir to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located. Proposed new §295.42 would implement TWC, §11.124, as amended by the 79th Legislature.

The commission proposes to change the title of Subchapter D from "Public Hearing" to "Contested Case Hearing" because this subchapter relates to contested case or trial-type hearings and the term "public hearing" is a broad term which includes all types of hearings.

The proposed amendment to §295.171, Request for Public Hearing, changes the title of the section from "Request for Public Hearing" to "Request for Contested Case Hearing," incorporates the requirements of 30 TAC Chapter 55, Subchapter G, concerning Requests for Reconsideration and Contested Case Hearings; Public Comments, and adds a reference to the time period specified in §55.251, to make the time for requesting a contested case hearing consistent with other commission rules. Additionally, the commission proposes to delete subsection (b) because those requirements are contained in Chapter 55, Subchapter G, and therefore, do not need to be repeated in §295.171(b).

The proposed amendment to §295.172, Public Hearing, changes all references from "public hearings" to "contested case hearings" to clarify that this rule only applies to contested case hearings. The reference to §295.171 will also be changed to refer to §55.251 and §55.255.

The proposed amendment to §295.173, Action on Application Without Public Hearing, changes the name of the section title from "Action on Application Without Public Hearing" to "Action on Application Without Contested Case Hearing" to more accurately reflect the contents of the section. Additionally, the proposed amendment combines existing paragraphs (1) and (2), renumbers existing paragraph (3) to new paragraph (2), and adds a new paragraph (3). Proposed paragraph (3) provides that the commission may take action on an application requiring notice without holding a contested case hearing, if the commission did not grant a request for a contested case hearing. This amendment is proposed to make the rule consistent with current commission procedures under TWC, §5.115.

The proposed amendment to §295.174, Applications for Temporary Permits, Emergency Permits, and Authorization to Divert Water From Unsponsored and Storage-Limited Projects for Domestic and Livestock Purposes, changes all references from "public hearings" to "contested case hearings" to clarify that this rule only applies to contested case hearings.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. Local governments, or other units of state government, who are water rights holders will see fiscal implications if they decide to construct a storage reservoir, but those implications are anticipated to be minor.

HB 2140 amended TWC, §11.124(b) to require that applications filed to construct a storage reservoir contain evidence that notice of the application has been given to each member of the governing bodies of each county and municipality in which the reservoir, or any part of the reservoir, will be located. The proposed rulemaking would amend §295.42 to require proof of mailed notice of the application to members of the appropriate governing bodies as now required by state law. In addition, the proposed rulemaking amends §295.2 to state that applicants must submit one original and six copies of the application and supporting materials when requesting any type of water permit. Current agency practice is to require an original and six copies, but the proposed rulemaking will clarify this requirement. The proposed rulemaking also makes administrative changes to Chapter 295 regarding contested case hearings to provide consistency and clarification within current rule provisions.

Local governments or other units of state government may see a cost increase if they apply to construct a storage reservoir. Staff cannot anticipate the number of future applications that will be filed to construct storage reservoirs. The requirement for each application for this type of construction to contain evidence of mailed notice to each member of the appropriate governing bodies will require the mailing of certified letters, which is estimated to cost $3.00 each. County commissioner courts have five members. Size of city councils varies among municipalities, but it is estimated that the average council size is six members. If a storage reservoir is constructed within one county and within one municipality, mailing costs could total $33 for each application. Constructing a storage reservoir that crosses county lines or is contained within more than one municipal boundary will cause application costs to increase by the number of members of each governing body. This increased cost is not anticipated to have significant fiscal implications for local governments or other units of state government.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and increased awareness among local government officials regarding planned construction of storage reservoirs that may be constructed within their jurisdictions.

The proposed rules would require applicants who wish to construct storage reservoirs, to send certified letters to each member of the appropriate governing bodies. Assuming an average cost of $3.00 per certified letter, a county commissioner court size of five, and an average city council size of six members, application costs to construct storage reservoirs could increase by $33. Application costs will increase incrementally if a storage reservoir is contained within more than one county or municipality. This increased cost is not anticipated to have significant fiscal implications for applicants applying to construct storage reservoirs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Fiscal implications are anticipated for small or micro-businesses planning to construct storage reservoirs, although they are not anticipated to be significant. Application costs would increase because of the requirement to send certified letters to each member of the appropriate local government. This cost, estimated to be $3.00 per letter, could be as much as $33. A small business is defined as having fewer than 100 employees or less than $1 million in annual gross receipts. A micro- business is defined as having no more than 20 employees. The cost per employee for a small business is estimated to be $0.33. For a micro-business, the cost is estimated to be $1.65 per employee.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

These proposed rules are not a "major environmental rule" as defined by Texas Government Code, §2001.0225(g)(3), because they are not proposed to protect the environment or reduce risks to human health from environmental exposure. The proposed rules are procedural and require six copies of an application and supporting materials, require proof of mailed notice of an application for a proposed storage reservoir to each member of a governing body of each county or municipality in which the reservoir will be located, change "public hearing" to "contested case hearing" in three existing rules, and add a current statutory procedure to the request for contested case hearing process. Therefore, no regulatory analysis on the costs of the proposed rulemaking is required.

Furthermore, these proposed rules do not exceed an express requirement of state law or exceed a requirement of a delegation agreement or contract between the state and federal government, and are not adopted under the general authority of the agency.

TAKINGS IMPACT ASSESSMENT

These proposed rules do not affect private real property. The proposed rules require six copies of an application and supporting materials, require proof of mailed notice of an application for a proposed storage reservoir to each member of a governing body of each county or municipality in which the reservoir will be located, change "public hearing" to "contested case hearing" in three existing rules, and add a current statutory procedure to the request for contested case hearing process. All of these changes are procedural changes which will aid the executive director's staff in processing applications, provide more notice of certain applications, clean up language concerning contested case hearings, and add a process for contested case hearing requests under TWC, §5.115.

None of these changes have any impact on any private real property interest. There are no alternatives to these procedural changes because they are either required for clarity or efficiency or reflect state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no sub-

stantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-057-297-PR. Comments must be received by 5:00 p.m. on April 10, 2006. For further information, please contact Kathy Hopkins, Water Rights Permitting and Availability Section, at (512) 239-2567.

SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 1. GENERAL REQUIREMENTS

30 TAC §295.2

STATUTORY AUTHORITY

The amendment is proposed under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. TWC, §§11.124 - 11.128, contain certain requirements for water rights applications.

The proposed amendment implements TWC, §§11.124 - 11.128, relating to application requirements for water rights, and TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§295.2. Preparation of Application.

(a) All applications shall be typewritten or printed legibly in ink. Illegible applications will be returned to the applicant. Applicants will be notified if additional information is needed to process an application, under [~~pursuant to~~] §281.4 of this title (relating to Applications for Use of State Water). The applicant should confer with the staff of the executive director on any questions concerning preparation of the application, especially if the application is unusual or unique. Upon express written or verbal approval of the applicant or the applicant's agent, any employee of the commission may make nonsubstantive changes in any documents submitted by the applicant. Substantive changes in an application may be made only by the applicant or the applicant's agent who submitted the application and only in the form of a written, notarized amendment to the application signed by the proper person; provided, however, that no substantive changes may be made after an application has been filed with the chief clerk of the commission by the executive director.

(b) All applicants shall submit one original and six copies of the application and supporting materials. In addition to the original notarized application form, if approved by the executive director, an applicant may submit electronic versions of required application documents.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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DIVISION 4. ADDITIONAL REQUIREMENTS FOR DAMS AND RESERVOIRS

30 TAC §295.42

STATUTORY AUTHORITY

The new section is proposed under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights; §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state; §11.132, which requires notice for certain applications; and §11.124(f), which requires that an applicant provide evidence that it has provided notice of an application to construct a proposed reservoir to the governing bodies of each county and municipality in which the reservoir will be located. The commission must enact procedural rules for notice, and amend them when required by commission decision or statutory law.

The proposed new section implements TWC, §11.132 and §11.124(f), concerning notice requirements for water rights applications. The new section specifically implements §11.124(f), requiring notice of a storage reservoir to each member of the governing body of each county and municipality in which the reservoir will be located. The proposed new section also implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§295.42. Additional Notice Requirement.

(a) The applicant for a permit to construct a storage reservoir shall give notice by certified mail of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located.

(b) For purposes of this section, a reservoir is located within a municipality when any part of the reservoir, when full, will be within the city limits of the municipality.

(c) An application for a permit to construct a storage reservoir must contain a copy of the notice that was mailed to each member of the governing bodies, as well as copies of the certified mailing cards.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6087

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SUBCHAPTER D. CONTESTED CASE HEARING

30 TAC §§295.171 - 295.174

STATUTORY AUTHORITY

The amendments are proposed under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights; §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state; and §5.115, which also contains requirements for a contested case hearing for water rights permits. The commission must enact procedural rules for contested case hearings, and amend them when required by commission decision or statutory law.

The proposed amendments implement TWC, §11.176 and §5.115, which contain the requirements for contested case hearings for water rights applications, and TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§295.171. Request for Contested Case Hearing [~~Public Hearing~~].

[~~(a)~~] A request for contested case hearing [~~public hearing~~] on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing [~~public hearing~~].

[~~(b) A written request for a hearing from an affected person who objects to the application shall contain the following information:~~]

[~~(1) the name, mailing address, and phone number of the person making the request;~~]

[~~(2) the application number or other recognizable reference to the application;~~]

[~~(3) a brief description of the interest of the requester, or of persons represented by the requester; and~~]

[~~(4) a brief description of how the application, if granted, would adversely affect such interest.~~]

§295.172. Contested Case Hearing [~~Public Hearing~~].

The commission may conduct a contested case hearing [~~public hearing~~] on any application. If the commission has received a request for a contested case hearing, [~~public hearing~~] which it determines is in compliance with §55.251 and §55.255 of this title (relating to Requests for Contested Case Hearing, Public Comment; and Commission Action on Hearing Request) [~~§295.171 of this title (relating to Request for Public Hearing)~~], if it determines that a contested case hearing [~~public hearing~~] would serve the public interest, or if a commissioner requests a contested case hearing [~~public hearing~~], the commission shall conduct a contested case hearing [~~public hearing~~] or refer the matter to the State Office of Administrative Hearings for a contested case hearing. [~~If the commission determines that a public hearing must be held, the matter shall be remanded for hearing.~~] See §295.157 of this title (relating to Notice of Hearing).

§295.173. Action on Application Without Contested Case Hearing [~~Public Hearing~~].

The commission may take action on an application requiring public notice at a regular meeting, without holding a contested case hearing [~~public hearing~~], provided:

(1) at least 30 days prior to the regular meeting at which action is taken, notice of the application has been given by publication and by mail and no person has requested a contested case hearing within 30 days of the publication of notice;

[~~(2) within the 30-day period after the publication of the notice, no request for a public hearing has been submitted by the executive director, the applicant, or an affected person who objects to the application; and~~]

(2) [~~(3)~~] no commissioner has submitted a request for a contested case hearing [~~public hearing~~] within the 30-day period after publication of the notice or requests a contested case hearing [~~public hearing~~] at the regular meeting of the commission at which action on the application could be taken according to such notice; or [~~.~~]

(3) the commission did not grant a request for a contested case hearing.

§295.174. Applications for Temporary Permits, Emergency Permits, and Authorization to Divert Water From Unsponsored and Storage-Limited Projects for Domestic and Livestock Purposes.

The sections in this subchapter relating to requests for contested case hearings [~~public hearings~~] and the requirements to hold contested case hearings [~~public hearings~~] in certain circumstances do not apply to applications for temporary water use permits, emergency water use permits, or authorization to divert water from unsponsored and storage-limited projects for domestic and livestock purposes. In these specified instances, the commission may conduct such hearings as it deems appropriate. However, the commission shall conduct a hearing on a temporary permit if it has been provisionally issued and if the permit has been cancelled upon request of the executive director under [~~pursuant to~~] §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

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Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 239-6087

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

The Texas Commission on Environmental Quality (commission) proposes amendments to §297.46 and §297.71.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 79th Legislature, 2005, passed House Bill (HB) 1225. This proposed rulemaking is necessary to implement that bill. This proposed rulemaking is also necessary to update the rules to reflect the agency's current practices, to adhere to the style and formatting requirements in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register and agency guidelines.

The 79th Legislature passed HB 1225 in response to recommendations by the Water Conservation Implementation Task Force, which was created by the 78th Legislature, 2003. HB 1225 added a provision to Texas Water Code (TWC), §11.173(b), which exempts a state water right from cancellation for nonuse if the nonuse was the result of water conservation measures. This measure will encourage the conservation of water in the state.

A corresponding proposed rulemaking that includes changes to 30 TAC Chapter 295, Water Rights, Procedural, is published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

The proposed amendment to §297.46, Consideration of Public Welfare, deletes an obsolete reference to 30 TAC Chapter 261, which has been repealed.

The proposed amendment to §297.71, Cancellation in Whole or in Part, adds subsection (b)(7) that provides an additional exemption from cancellation for those water rights that are not used due to implementation of water conservation measures. Subsection (b) implements HB 1225, as amended by the 79th Legislature, which will encourage water conservation.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rulemaking would implement HB 1225, which amended TWC, §11.173(b). HB 1225 encourages water conservation by exempting a state water right from cancellation for nonuse if that nonuse was the result of water conservation measures. Additionally, the proposed rulemaking amends Chapter 297 to reflect current agency practices.

Current agency practice reflects the provisions of the proposed rulemaking and has no fiscal implications to local government water right holders.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased efforts to conserve water and greater consistency between agency rules and the TWC.

The proposed rulemaking implements provisions of TWC, §11.173(b), and encourages water conservation by exempting a state water right from cancellation for nonuse if that nonuse was the result of water conservation measures. Additionally, the proposed rulemaking amends Chapter 297 to reflect current agency practices.

Current agency practice reflects the provisions of the proposed rulemaking and has no fiscal implications to water right holders.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Current agency practice reflects the provisions of the proposed rules and has no fiscal implications to water right holders.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

These proposed amendments are not a "major environmental rule" as defined by Texas Government Code, §2001.0225(g)(3), because they are not proposed to protect the environment or reduce risks to human health from environmental exposure. The purpose of the proposed rulemaking is to comply with state law. TWC, §11.173(b), exempts a state water right from cancellation for nonuse if the nonuse was the result of water conservation measures. This change is not expressly to protect the environment and reduce risks to human health and the environment. Therefore, no regulatory analysis on the costs of the proposed rulemaking is required.

Furthermore, these proposed amendments do not exceed an express requirement of state law or exceed a requirement of a delegation agreement or contract between the state and federal government, and are not adopted under the general authority of agency.

TAKINGS IMPACT ASSESSMENT

These proposed amendments do not affect private real property. These changes exempt conserved water from cancellation. The purpose of the proposed rulemaking is to comply with state law. TWC, §11.173(b), exempts a state water right from cancellation for nonuse if the nonuse was the result of water conservation measures.

These proposed amendments do not burden private real property because allowing a further exemption from cancellation protects private real property. There are no alternatives to these proposed amendments because the proposed amendments implement state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no sub-

stantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-057-297-PR. Comments must be received by 5:00 p.m. April 10, 2006. For further information, please contact Julie Wood, Water Rights Permitting and Availability Section, at (512) 239-1282.

SUBCHAPTER E. ISSUANCE AND CONDITIONS OF WATER RIGHTS

30 TAC §297.46

STATUTORY AUTHORITY

The amendment is proposed under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under TWC, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§297.46. Consideration of Public Welfare.

The commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare. [~~In making this determination, the commission shall consider the social, economic and environmental impact statement submitted with an application if required by Chapter 261, Subchapters B and D, of this title (relating to Environmental, Social and Economic Impacts Statements).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron Perdue
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For further information, please call: (512) 239-6087

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SUBCHAPTER G. CANCELLATION, REVOCATION, ABANDONMENT, AND FORFEITURE OF WATER RIGHTS

30 TAC §297.71

STATUTORY AUTHORITY

The amendment is proposed under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under TWC, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. Specifically, TWC, §11.173, provides the commission with the authority to cancel water rights. The commission must amend its substantive rules to ensure that the commission's rules are consistent with commission decisions and statutory law.

The proposed amendment implements TWC, §11.173(d)(5), which exempts from cancellation water rights for which nonuse was due to implementation of water conservation measures under a water conservation plan submitted by the holder of the water right. Additionally, the proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§297.71. Cancellation in Whole or in Part.

(a) Except as provided by subsection (b) of this section, if all or part of a water right has not been put to beneficial use during a consecutive ten-year [~~ten year~~] period, such water right is subject to cancellation in whole or in part as provided by this subchapter.

(b) A water right is not subject to cancellation as provided by subsection (a) of this section to the extent that such nonuse is the result of:

(1) the water right holder's participation in the Conservation Reserve Program authorized by 16 United States Code, §§3831-3836, [~~the~~] Food Security Act of 1985 [~~, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985)~~] or a similar governmental program;

(2) - (4) (No change.)

(5) the water right was obtained to meet demonstrated long-term public water supply or electric generation needs as evidenced by a water management plan developed by the water right holder, and the water right is consistent with projections of future water needs contained in the state water plan; [~~or~~]

(6) the water right was obtained as the result of the construction of a reservoir funded, in whole or in part, by the holder of the water right, as part of the water right holder's long-term water planning; or [~~.~~]

(7) the implementation of water conservation measures under a water conservation plan submitted by the holder of the permit, certified filing, or certificate of adjudication as evidenced by implementation reports submitted by the holder.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 65. EXECUTIVE DIRECTOR

34 TAC §65.3

The Employees Retirement System of Texas (System) proposes amendments to §65.3, concerning Records of the System. The amendments are being proposed in order for the amount of the charges allowed for providing public information and copies of public information in the possession of the System to conform with statewide standards.

Paula A. Jones, General Counsel, has determined that the first five years the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule because the changes conform to established statewide standards.

Ms. Jones has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amended rule will be continued understanding by the public of how costs are calculated when the System responds to Public Information Act requests. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the amendments as proposed will vary according to the amount and type of copies requested.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on Monday, April 10, 2006.

The amendments are proposed under Texas Government Code §815.102, which provides authorization for the Board of Trustees to adopt rules for the transaction of any other business of the board.

No other statutes are affected by the proposed amendments.

§65.3. Records of the System.

(a) The executive director or her designee is the custodian of records of the Employees Retirement System of Texas.

(b) (No change.)

(c) The following guidelines are established for charges to be made for providing public information and copies of public information in the possession of the system.

(1) Standard paper copy [~~Standard-size paper copy~~]--$.10 per page.

(2) Nonstandard-size [~~paper~~] copy: [~~--~~]

(A) Diskette: [~~--~~]$1.00; [~~each.~~]

(B) Magnetic tape:actual cost;

~~*[(i)* 4 mm.--$13.50 each;]~~

~~*[(ii)* 8 mm.--$12 each;]~~

~~*[(iii)* 9-track--$11 each;]~~

(C) Data cartridge: actual cost; [~~VHS video cassette--$2.50 each.~~]

(D) Tape cartridge: actual cost; [~~Audio cassette--$1.00 each.~~]

(E) Rewritable CD (CD-RW)--$1.00; [~~Oversized paper copy--$.50 each.~~]

(F) Non-rewritable CD (CD-R)--$1.00 [~~Tape Cartridge:~~]

~~*[(i)* 250 MB--$38 each;]~~

~~*[(ii)* 525 MB--$45 each.]~~

(G) Digital video disc (DVD)--$3.00; [~~Mylar (36-inch, 42-inch, and 48-inch):~~]

~~*[(i)* 3 mil.--$.85/linear foot;]~~

~~*[(ii)* 4 mil.--$1.10/linear foot;]~~

~~*[(iii)* 5 mil.--$1.35/linear foot.]~~

(H) JAZ drive--actual cost; [~~Other--actual cost.~~]

(I) Other electronic media--actual cost;

(J) VHS video cassette--$2.50;

(K) Audio cassette--$1.00;

(L) Oversize paper copy (e.g.: 11 inches by 17 inches, greenbar, bluebar, not including maps and photographs using specialty paper)--$.50;

(M) Specialty paper (e.g.: Mylar, blueprint, blueline, map photographic)--actual cost.

(3) Labor [~~Personnel~~] charge:

(A) For programming--$28.50 per hour; [~~Programming personnel--$26 per hour.~~]

(B) For locating, compiling, and reproducing [~~Other personnel~~]--$15 per hour.

(4) Overhead charge--20% of labor [~~personnel~~] charge.

(5) Microfiche or microfilm charge:[~~--~~]

(A) Paper copy--$.10 per page;[~~.~~]

(B) (No change.)

(6) (No change.)

(7) Computer resource charge:[~~--~~]

(A) Mainframe--$10 per CPU minute;[~~.~~]

(B) Midsize--$1.50 per CPU minute;[~~.~~]

(C) Client/server system--$2.20 per clock hour;[~~.~~]

(D) PC or LAN--$1.00 per clock hour.

(8) - (9) (No change.)

(10) Photographs--actual cost as calculated in accordance with 1 TAC §111.69(5) [~~Access to information in other than standard-size form where no copies are made and the information is not readily available-$15 per hour/personnel cost.~~]

(11) Maps--actual cost as calculated in accordance with 1 TAC §111.69(4) [~~Outsourced/contracted services--actual cost.~~]

(12) Other costs--actual cost. [~~No Sales Tax--No Sales Tax shall be applied to copies of public information.~~]

(13) Outsourced/Contracted Services--actual cost for the copy or services. May not include development costs. [~~Other costs--actual cost.~~]

(14) No Sales Tax--no Sales Tax shall be applied to copies of public information.

(d) No charge shall be made for one copy of any public record requested by members of the Legislature [~~legislature~~] in the performance of their legislative duties or if the system determines that furnishing the records without cost can be considered as primarily benefiting the trust fund [~~general public~~].

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200601017
Paula A. Jones
General Counsel
Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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CHAPTER 73. BENEFITS

34 TAC §73.17

The Employees Retirement System of Texas (ERS) proposes amendments to 34 TAC Chapter 73, §73.17, concerning Disability Retirement--Eligibility. The proposed amendment to 34 TAC §73.17 clarifies the executive director's authority to request medical and other information in connection with Texas Government Code §814.208 and related statutes from ERS disability retirees to determine whether such retirees continue to meet the eligibility requirements for disability retirement and associated health insurance benefits as provided in Texas Government Code §§814.201 - 814.211 and Texas Insurance Code Chapter 1551. The amendment also defines the term "comparable pay" and affirms ERS staff's authority and practice in calculating and adjusting comparable pay to reflect changes in state pay that a disability retiree would likely have realized if he or she had not retired.

Paula A. Jones, General Counsel, has determined for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Jones has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amended rule will be that the ERS trust fund will be protected through enforcement of the eligibility requirements for continuation of ERS disability retirement benefits and associated health insurance benefits. There will be no affect on small business. The anticipated economic cost to persons who are required to comply with the amendments as proposed will vary among individual ERS members or retirees according to the results of periodic medical examinations and/or other information that may be requested by ERS in order to determine whether or not the member or retiree is or remains incapacitated for the further performance of duty.

Comments on the proposed amendments may be submitted to Paula A. Jones, General Counsel, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on Monday, April 10, 2006.

The amendments are proposed under Texas Government Code, §815.102 which provides authorization for the Board of Trustees to adopt rules relating to the administration of the funds of the retirement system and for the transaction of other business of the Board.

No other statutes are affected by the proposed amendments.

§73.17. Disability Retirement--Eligibility.

(a) Incapacity from the further performance of duty means that the member has demonstrably sought and been denied workplace accommodation of the disability in accordance with applicable law, and that the member is physically or mentally unable to continue to hold the position occupied and to hold any other position offering comparable pay. The education, training, and experience of the employee are to be considered when making this determination. "Comparable pay" means eighty (80) percent or more of the member's final state base pay prior to deductions for taxes or deferred compensation as provided or allowed by state and federal law; and it includes longevity and hazardous duty pay. Comparable pay may be adjusted by retirement system staff to account for realized state pay rate changes over time. The term excludes the monetary value of insurance and retirement benefits.

(b) In addition to the periodic medical examinations provided for in Texas Government Code §814.208(a), the executive director may direct a disability retiree to undergo additional medical examinations and to provide additional information satisfactory to the retirement system relevant to determining whether or not the retiree remains incapacitated for the further performance of duty. Absent a showing of good cause, a disability retiree who fails to respond to the request in a timely manner may have his or her disability retirement benefits and associated health insurance benefits suspended until the retiree has fully complied with the request. If the retiree fails to comply with the request for one year from the date the information was first requested by the retirement system, then all disability retirement benefits shall be terminated.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Paula A. Jones
General Counsel
Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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CHAPTER 81. INSURANCE

34 TAC §§81.1, 81.3, 81.5, 81.7 - 81.9, 81.11

The Employees Retirement System of Texas (ERS) proposes amendments to Texas Administrative Code, Title 34, Chapter 81, §§81.1, 81.3, 81.5, 81.7, 81.9, and 81.11, and new §81.8.

New §81.8 and amendments to §§81.1, 81.3, 81.7, and 81.9 concern the establishment of an incentive credit to waive health coverage, an optional TRICARE Supplemental health plan under the Texas Employees Group Benefits Program (GBP), and non-substantive administrative modifications of the rules. The TRICARE Supplemental health plan is contingent upon the selection of a qualified Carrier by the ERS Board of Trustees. The new rule and amendments are needed to update and clarify the rules and to comply with and conform to House Bill 417 and Senate Bill 1863, 79th Legislature, Regular Session, as they may be harmonized in light of changes made to the same section of the law. Both bills authorize a TRICARE Supplement for those eligible participants who waive health coverage, and Senate Bill 1863 creates an incentive credit to be applied toward the premium of either optional coverage or the TRICARE Supplement for those eligible participants who waive health coverage.

Section 81.1 is amended to add definitions for TRICARE and the TRICARE Supplement. This amendment defines TRICARE as the United States Department of Defense health care program for active and retired members of the uniformed services and their dependents, and the TRICARE Supplement as the plan of health care coverage designed to be secondary coverage to the TRICARE program. This section is further amended to clarify that TRICARE Supplement premiums are included in the definition of Insurance premium expense.

Section 81.3 is amended by adding subsection (c) to provide statutory references for board approval of one or more TRICARE Supplement Carrier(s) to offer supplemental health benefits to eligible GBP participants who waive health coverage.

Section 81.7 is amended to: (1) reference new §81.8 regarding the participation and enrollment requirements for those new employees and retirees who are eligible to waive health coverage and receive an incentive credit; (2) allow an annual opportunity to waive health coverage; (3) add the TRICARE Supplement as an optional coverage; and (4) make conforming reference changes.

Section 81.7(g)(1) is amended to remove a reference to the cancellation of health coverage by a participant who is assigned to active military duty. This provision is no longer needed because a GBP participant may apply for, elect, or continue enrollment in optional coverage without concurrent enrollment in health coverage.

Section 81.7(h)(8)(C) is amended to remove a reference that allowed an employee to re-enroll after the close of the annual enrollment opportunity. This provision is no longer needed due to the automation of the annual enrollment opportunity.

New §81.8(a) is added to establish who is eligible to waive health coverage and the events that permit an election to waive health coverage.

New §81.8(b) is added to clarify that an individual who waives health coverage and later elects to apply for health coverage is subject to the applicable provisions of this chapter.

New §81.8(c) is added to clarify the amount of and the eligibility requirements to receive the incentive credit, and to delineate that: (1) the incentive credit may only be used for optional coverage specified by the system or the TRICARE Supplement; (2) coverage under the TRICARE Supplement ends when the participant attains age 65; however, the incentive credit will be applied toward eligible optional coverage; and (3) optional coverage is not considered voluntary coverage for the purposes of the incentive credit.

New §81.8(d) is added to clarify that the offering of a TRICARE Supplement is contingent upon the selection of a qualified Carrier by the ERS Board of Trustees.

Section 81.9(a) is amended to include those enrolled in the TRICARE Supplement plan as an exempted group under the ERS grievance procedures. This section is further amended to add the terms "carrier" and "administering firm" as entities that may formally deny an insurance claim and mail notice of the denial and right of appeal to a person. These changes are needed to update and clarify the rules with regard to grievance procedures. The section is also amended to clarify that the grievance procedures apply to both a denial of benefits and other adverse decisions by an insurance carrier or administering firm.

Section 81.9(d) is amended to clarify existing practice that a notice of appeal to the Board regarding a decision by the Executive Director must be in writing and filed with ERS within the specified time period.

Throughout Chapter 81, including §81.5 and §81.11, the words "legislature" and "program" have been capitalized, and the word "State" in State of Texas has been changed to lower case. These changes are needed for consistency in the rules, and these words are either proper nouns or refer to definitions. The word "title" has been changed to "chapter" for correct reference purposes.

Paula A. Jones, General Counsel, has determined that for the first five-year period the new and amended rules are in effect, a positive fiscal implication has been forecast for the state. There will be no fiscal implication for local government as a result of enforcing or administering the new and amended rules; and small businesses and individuals will not be affected.

Ms. Jones also determined that for each year of the first five years the new and amended rules are in effect the public benefit anticipated as a result of enforcing the new and amended rules will be new options for participants in the GBP, including an incentive credit for waiving health coverage and the availability of an optional TRICARE Supplemental health plan upon selection of a Carrier by the Board. There are no known anticipated economic costs to persons who are required to comply with the new and amended rules as proposed.

Comments on the proposed new and amended rules may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or e-mail Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on Monday, April 10, 2006.

The new rule and rule amendments are proposed under Texas Insurance Code, §§1551.009, 1551.052, and 1551.221.

No other statutes beyond Chapter 1551, Insurance Code, are affected by these amendments.

§81.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (2) (No change.)

(3) Active duty--The expenditure of time and energy in the service of the state [~~State~~] of Texas. An employee will be considered to be on active duty on each day of a regular paid vacation or regular paid sick leave or on a non-working day, if the employee was on active duty on the last preceding working day.

(4) - (9) (No change.)

(10) Department--Commission, board, agency, division, institution of higher education, or department of the state [~~State~~] of Texas created as such by the constitution or statutes of this state, or other governmental entity whose employees or retirees are authorized by the Act to participate in the Program [~~program~~].

(11) - (12) (No change.)

(13) Employee--A person authorized by the Act to participate in the Program [~~program~~] as an employee.

(14) Employing office--For a retiree covered by this Program [~~program~~], the office of the Employees Retirement System of Texas in Austin, Texas or the retiree's last employing department; for an active employee, the employee's employing department.

(15) Evidence of insurability--Such evidence required by a qualified carrier for approval of coverage or changes in coverage pursuant to the rules of §81.7(h) of this chapter [~~title~~] (relating to Enrollment and Participation).

(16) - (17) (No change.)

(18) HMO--A health maintenance organization approved by the board to provide health care benefits to eligible participants in the Program [~~program~~] in lieu of participation in the Program's [~~program's~~] HealthSelect of Texas plan.

(19) Insurance premium expenses--Any out-of-pocket premium incurred by a participant, or by a spouse or dependent of such participant, as payment for coverage provided under the Program [~~program~~] that exceeds the state's or institution's contributions offered as an employee benefit by the employer. The types of premium expense covered by the premium conversion plan include out-of-pocket premium for group term life, health (including HMO and TRICARE Supplement premiums), AD&D, and dental, but do not include out-of-pocket premium for long or short term disability or dependent term life.

(20) - (22) (No change.)

(23) Preexisting condition--Any injury or sickness, for which the employee received medical treatment, or services, or took prescribed drugs or medicines during the three-month period immediately prior to the effective date of such coverage. However, if the evidence of insurability requirements set forth in §81.7(h) of this chapter [~~title~~] must first be satisfied, the three-month period for purposes of determining the preexisting conditions exclusion will be the three-month period immediately preceding the date of the employee's completed application for coverage.

(24) - (25) (No change.)

(26) Retiree--An employee who retires or is retired and who:

(A) is authorized by the Act to participate in the Program [~~program~~] as a retiree;

(B) (No change.)

(C) on the date of retirement, meets the service credit requirements of the Act for participation in the Program [~~program~~] as an annuitant; and

(i) on August 31, 2001, was an eligible employee with a department whose employees are authorized to participate in the Program [~~program~~] and, on the date of retirement has three years of service with such a department;

(ii) on August 31, 2001, had three years of service as an eligible employee with a department whose employees are authorized to participate in the Program [~~program~~]; or

(iii) (No change.)

(27) Salary--The salary to be used for determining optional term life and disability income limitations will be the employee's regular salary, including longevity, shift differential, hazardous duty pay, and benefit replacement pay, received by the employee as of the employee's first day of active duty within a contract year. No other component of compensation shall be included. Non-salaried elective and appointive officials and members of the Legislature [~~legislature~~] may use the salary of a state district judge or their actual salary as of September 1 of each year.

(28) (No change.)

(29) TRICARE--(formally call CHAMPUS)--The United States Department of Defense (DOD) military health system program for eligible active duty and retired members of the uniformed services, their families, and survivors.

(30) TRICARE Supplement--A supplemental health care coverage plan designed specifically to be secondary coverage to the TRICARE program.

(31) [~~(29)~~] TRS--The Teacher Retirement System of Texas.

§81.3. Administration.

(a) Health maintenance organizations.

(1) (No change.)

(2) In order to seek approval, an HMO must:

(A) submit an application to provide health benefits in the areas within the state [~~State~~] of Texas determined by the board to be non-bidding areas;

(B) - (C) (No change.)

(3) An HMO seeking board approval in response to a request for bid in one or more of the RBAs, must satisfy the following conditions:

(A) The HMO must be licensed by the Texas Department of Insurance to operate in the state [~~State~~] of Texas.

(B) - (G) (No change.)

(4) An HMO, seeking board approval in response to an application in one or more of the non-bidding areas, must satisfy the following conditions:

(A) The HMO must be licensed by the Texas Department of Insurance to operate in the state [~~State~~] of Texas.

(B) - (G) (No change.)

(b) Payment of Premiums.

(1) Premiums for coverage provided under the Program [~~program~~] are funded from three sources: state contributions, system contributions, and participant contributions. The Legislature [~~legislature~~] appropriates monies to fund group insurance benefits for all employees as defined in the Act. Monies for employees compensated from funds other than the General Appropriations Act are appropriated from the official operating budget of the respective department. In addition, the system may contribute an additional amount, as determined by the trustee, for payment of premiums for participants. A participant who applies for coverage for which the monthly premium exceeds the state's or employing department's and the system's contribution must pay the excess amount.

(2) A participant's share of premiums shall be paid through deductions from monthly compensation or annuities or by direct payment, as provided in this paragraph.

(A) An employee or annuitant who applies for coverage for which the monthly premium exceeds the state or employing department and the system contributions must authorize on a form prescribed by the system a deduction from his or her monthly compensation or annuity to pay the difference. If the compensation or annuity is insufficient to provide for the appropriate deduction, the participant must pay premiums directly as provided in subparagraph (B)(i) of this paragraph. Failure to make the required payment of premiums by the due date will result in the cancellation of all coverages not fully funded by the state contribution. A participant entitled to the state contribution will retain member only health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected, the participant will be enrolled in the basic plan except as provided for in §81.7(l)(2)(B) of this chapter [~~title~~].

(B) A participant shall pay premiums directly, as provided in this subparagraph, if the participant is not on a payroll or is in a leave without pay status, is not receiving an annuity from a state retirement system from which the appropriate premiums may be deducted, or is not receiving a salary or annuity sufficient to allow for a full required premium deduction.

(i) An employee whose salary is insufficient, or who is a non-salaried board member, shall pay monthly premiums in advance through the employing department. Any other participant to whom this subparagraph applies shall pay monthly premiums in advance to the system. Premium payments are due on the first day of the month covered and must be postmarked or received by the system or the employing department, whichever is appropriate, within 30 days of the due date to avoid cancellation of coverage. Failure to make the required premium payment by the due date will result in cancellation of all coverages not fully funded by the state contribution, if applicable. A person entitled to the state contribution will retain member only health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected by the employee or retiree, the employee or retiree will be enrolled in the basic plan except as provided for in §81.7(l)(2)(B) of this chapter [~~title~~].

(ii) A person who continues group health and dental benefits as provided in §81.5(k) of this chapter [~~title~~] (relating to Eligibility) must pay premiums in advance on a monthly basis. Premiums for such a person will be 102% of the rates charged for other participants in the same coverage category and with the same plan. All premiums due for the election/enrollment period must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation of coverage enrollment form. Subsequent premiums are due on the first day of the month covered and must be postmarked or received by the Employees Retirement System of Texas within 30 days of the due date to avoid cancellation of coverage.

(iii) A person who continues group health and dental benefits as provided in §81.5(k)(3) of this chapter [~~title~~] (relating to Eligibility) must pay premiums in advance on a monthly basis. Premiums for such a person for each month of coverage after the 18th month of coverage will be 150% of the rates charged for other participants in the same coverage category and with the same plan. All premiums are due on the first day of the coverage month and must be postmarked or received by the Employees Retirement System of Texas within 30 days of the due date to avoid cancellation of coverage.

(3) (No change.)

(c) TRICARE Supplement. In accordance with §1551.221 of the Act, the Board may contract for one or more Carriers as that term is defined under §1551.007 of the Act to offer a TRICARE supplemental health coverage plan to eligible program participants who waive health coverage as described in §81.8 of this chapter.

§81.5. Eligibility.

(a) Full-time employees. A full-time employee, elected officer, or appointed officer of the state [~~State~~] of Texas is eligible for automatic coverage upon completion of the waiting period established in §1551.1055 [~~Section 1551.1055~~] of the Act. A rehired full-time employee, reelected officer, or reappointed officer of the state [~~State~~] of Texas, including a new full-time employee, each with existing, current, and continuous GBP health coverage as of the date the employee begins active duty or is qualified for and begins to hold office, is eligible for automatic coverage without a waiting period provided there has been no break in coverage in the GBP. However, an employee of an institution of higher education and the employee's eligible dependents are eligible for coverage on the first day that an employee performs services as an employee of an institution of higher education only if:

(1) - (3) (No change.)

(b) Part-time employees. A part-time employee or other employee who is not eligible for automatic coverage becomes eligible for coverage upon completion of the waiting period established in §1551.1055 [~~Section 1551.1055~~] of the Act and upon application to participate in the Program [~~program~~], subject to the provisions of §81.7(b) of this chapter [~~title~~] (relating to Enrollment). A rehired part-time employee, reelected part-time officer, or reappointed part-time officer of the state [~~State~~] of Texas, including a new part-time employee, each with existing, current, and continuous GBP health coverage as of the date the employee begins active duty or is qualified for and begins to hold office, who is not eligible for automatic coverage is eligible for coverage without a waiting period provided there has been no break in coverage.

(1) - (2) (No change.)

(c) Retirees.

(1) - (6) (No change.)

(7) A retiree who returns to work for a department may continue coverages for which he is eligible as a retiree, or, subject to subsection (a) or subsection (b) of this section, elect to participate in the Program [~~program~~] as a full-time or part-time employee. Time spent in an eligible position as a return to work retiree may not be used to meet eligibility requirements for retiree health insurance coverage. A return to work retiree may elect retiree coverages for which he is eligible at the time of separation from department service.

(8) (No change.)

(d) Dependents of employees and retirees.

(1) (No change.)

(2) Except as otherwise provided in this paragraph, double coverage is not permitted for any participant in the Program [~~program~~].

(A) - (B) (No change.)

(e) (No change.)

(f) Surviving dependents.

(1) (No change.)

(2) Dependent children of a deceased active employee or retiree are eligible to continue coverage in the health and dental ben-

efits plans in which the dependent children were enrolled on the day of death of the employee/retiree provided, however, the deceased active employee must have had, at the time of death, at least 10 years of service credit, including at least 3 years on August 31, 2001 or at least 10 years after August 31, 2001 of service as an eligible employee with a Program participating department, as long as the surviving spouse is eligible and continues to participate in the Program [~~program~~]. A deceased active employee described by §1551.114 of the Act must have had at least 10 years of eligible service credit, as determined by ERS, before his or her dependent children are eligible to continue coverage. Dependent children of deceased employees or retirees will be considered as dependents of the deceased employee's or retiree's surviving spouse for purposes of the Program [~~program~~]. Participants continuing coverage as surviving dependents are not eligible for life insurance coverage.

(3) If an active employee/retiree does not have a spouse covered in the Program [~~program~~] at the time of his or her death, dependent children of the deceased active employee/retiree are eligible to continue coverage in the health and dental benefits plans in which the dependent children were enrolled on the day of death of the employee/retiree provided, however, the deceased active employee must have had at least 10 years of service credit, including at least 3 years on August 31, 2001 or at least 10 years after August 31, 2001 of service as an eligible employee with a Program participating department, at the time of death. A deceased active employee described by §1551.114 of the Act must have had at least 10 years of eligible service credit, as determined by ERS, before his or her dependent children are eligible to continue coverage. A surviving dependent child may continue such coverage until the dependent child becomes ineligible as defined in §81.1 of this chapter [~~title~~] (relating to Definitions). Participants continuing coverage as surviving dependents are not eligible for life insurance coverage.

(4) - (5) (No change.)

(g) Retiree under ORP.

(1) A member of the ORP is eligible for health coverage on the day he or she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his or her membership been in the Teacher Retirement System rather than the ORP, and meets the age, length-of-service, and other requirements as provided in §81.5(c) of this chapter [~~title~~] (relating to Eligibility).

(2) A member of the ORP is eligible for additional coverages and plans which include optional and voluntary coverages in the Program [~~program~~] as long as he or she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his or her membership been in the Teacher Retirement System rather than the ORP.

(h) Disability retirement. An applicant who is approved for disability retirement is entitled to retiree insurance coverages as provided in §81.7(c) of this chapter [~~title~~] (relating to Enrollment and Participation). An ORP participant authorized by the Act with at least 10 years of eligible service credit, and granted ORP disabled retiree status in the Program, as established by the disability test used by the system, is eligible to participate in the Program. Initial or continued eligibility for insurance coverage for an ORP disabled retiree will be determined by the system under the following provisions.

(1) An ORP participant is eligible for ORP disabled retiree status in the Program [~~program~~] if the ORP participant is not otherwise eligible to participate in the Program [~~program~~] as an employee or retiree and is certified by a licensed physician designated by the system as disabled as provided in paragraph (2) of this subsection. An ORP participant may apply for disabled retiree status in the Program [~~program~~] by filing a written application for ORP disabled retiree status in the Program [~~program~~] or having an application filed with the system by the ORP participant's spouse, employer, or legal representative. In addition to an application for ORP disabled retiree status in the Program [~~program~~], an ORP participant must file with the system the results of a medical examination of the ORP participant. After an ORP participant applies for ORP disabled retiree status in the Program [~~program~~], the system may require the ORP participant to submit additional information about the disability. The system will prescribe forms for the information required by this section.

(2) If a licensed physician designated by the system finds that the ORP participant is mentally or physically disabled from the further performance of duty and that the disability is probably permanent, the physician will certify the disability. The Executive Director is authorized to approve ORP disabled retiree status in the Program [~~program~~] after a certification of disability is made. Once each year during the first five years after an ORP participant enrolls in the Program [~~program~~] as an ORP disabled retiree, and once in each three-year period after that, the system may require an ORP disabled retiree to undergo a medical examination by a physician the system designates. If an ORP disabled retiree refuses to submit to a medical examination as provided by this section, the system will suspend the ORP disabled retiree's enrollment in the Program [~~program~~] until the ORP disabled retiree submits to an examination. The system will terminate the ORP disabled retiree's coverage in the Program [~~program~~] and notify the ORP participant in writing if:

(A) - (B) (No change.)

(3) The effective date of coverage for an ORP disabled retiree in the Program [~~program~~] is the first of the month following the date the application for ORP disabled retiree status in the Program [~~program~~] is received by the system, or the first of the month following the date employment is terminated, whichever is later.

(i) Former members of the Legislature [~~legislature~~]. A former member of the Legislature [~~legislature~~] authorized by the Act to continue to participate in the Program [~~program~~] is eligible for the coverage, other than disability income insurance coverage, in effect on the day before the member leaves office.

(j) Former employees of the Legislature [~~legislature~~]. A former employee of the Legislature [~~legislature~~] authorized by the Act to continue to participate in the Program [~~program~~] is eligible for the coverage, other than disability income insurance coverage, in effect on the day before the employee terminates employment.

(k) Continuation of health and dental coverages only for certain spouses and dependent children of employee/retirees, and for certain terminating employees, their spouses, and dependent children (as provided by the Consolidated Omnibus Budget Reconciliation Act, Public Law 99-272).

(1) (No change.)

(2) An employee whose employment has been terminated voluntarily or involuntarily (other than for gross misconduct), whose work hours have been reduced such that the employee is no longer eligible for the Program [~~program~~] as an employee, or whose coverage has ended following the maximum period of leave without pay as provided for in §81.7(1)(2)(A) of this chapter [~~title~~], except for those persons not eligible pursuant to §81.11(c) of this chapter [~~title~~] (relating to Termination of Coverage), and/or his or her spouse and/or dependent child/children who are not eligible to continue coverage under the provisions of the Act or subsection (h) or (i) of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, who are not covered under any other group health plan, or who were covered

by a plan that subjects them to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 (HIPAA), may continue for up to 18 months the health and dental coverages only without the basic term life that were in effect immediately prior to the date of the loss of coverage. A formal election must be made to continue coverage by the employee and/or his or her spouse and/or dependent child/children. The formal election must be postmarked or received by the system within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage terminated, whichever is later.

(3) - (9) (No change.)

(l) (No change.)

§81.7. Enrollment and Participation.

(a) Full-time employees and their dependents.

(1) A new employee:

(A) who is not subject to the health insurance waiting period and is eligible under the Act and as provided for in §81.5(a) of this chapter [~~title~~] (relating to Eligibility) for automatic insurance coverage, shall be enrolled in the basic plan of health and life insurance unless the employee completes an enrollment form to elect other coverages or to waive [~~decline~~] health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage). Coverage of an employee under the basic plan, and other coverages selected as provided in this paragraph, become effective on the date on which the employee begins active duty.

(B) who is subject to the health insurance waiting period and is eligible under the Act and as provided for in §81.5(a) of this chapter [~~title~~] (relating to Eligibility) for automatic insurance coverage, shall be enrolled in the basic plan of health and life insurance beginning on the first day of the calendar month following 90 days of employment unless, before this date, the employee completes an enrollment form to elect other coverages or to waive [~~decline~~] health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage).

(2) - (4) (No change.)

(5) An eligible employee who enrolls in the Program [~~program~~] is eligible to participate in premium conversion and shall be automatically enrolled in the premium conversion plan. The employee shall be automatically enrolled in the plan for subsequent plan years as long as the employee remains on active duty.

(6) - (11) (No change.)

(b) (No change.)

(c) Retirees and their dependents.

(1) Provided the required premiums are paid or deducted, an employee's health, dental and term life insurance coverage (including eligible dependent coverages) may be continued upon retirement as provided in §81.5(c) of this chapter [~~title~~] (relating to Eligibility). The life insurance will be reduced to the maximum amount which the retiree is permitted to retain under the insurance contract as a retiree. All other coverages in force for the active employee, but not available to a retiree, will automatically be discontinued concurrently with the commencement of retirement status. If a retiree retires directly from department service and is not covered as an active employee on the day before becoming an annuitant, the retiree will be enrolled in the basic plan.

(2) A retiree may enroll in health, dental, and life insurance coverages for which the retiree is eligible as provided in §81.5(c) of this chapter [~~title~~] (relating to Eligibility), including dependent coverages, by completing an enrollment form as specified in paragraph (2)(A) - (2)(C) of this subsection. For the purposes of this paragraph, the effective date of retirement of a retiree who is eligible to receive, but who is not actually receiving, an annuity is the date on which the system receives written notice of the retirement. An application/enrollment form received after the initial period for enrollment as provided in this paragraph is subject to the provisions of subsection (h) of this section.

(A) A retiree who is not subject to the health insurance waiting period on the effective date of retirement as provided in §81.5(c) of this chapter [~~title~~ (relating to Eligibility), may enroll in health, dental, and life insurance coverages or waive health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage) for which the retiree is eligible, including dependent coverage, by completing an enrollment form or waiver of coverage as applicable before, on, or within 30 days after, the retiree's effective date of retirement.

(B) A retiree who is subject to the health insurance waiting period on the effective date of retirement as provided in §81.5(c) of this chapter [~~title~~] (relating to Eligibility), may enroll in health coverage or waive health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage) for which the retiree is eligible, including dependent coverage, by completing an enrollment form or waiver of coverage as applicable, before the first day of the calendar month following 90 days after the date of retirement or before the first day of the calendar month after the retiree's 65th birthday, whichever is later as appropriate. The effective date for such coverages shall be the first day of the calendar month following 90 days after the date of retirement or the first day of the calendar month following the retiree's 65th birthday, whichever is later as appropriate.

(C) A retiree who is ineligible for health insurance on the effective date of retirement as provided in §81.5(c) of this chapter [~~title~~] (relating to Eligibility), may enroll in health coverage or waive health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage) for which the retiree is eligible, including dependent coverage, by completing an enrollment form or waiver of coverage as applicable, before the first day of the calendar month after the retiree's 65th birthday. The effective date for such coverages shall be the first day of the calendar month following 90 days after the date of retirement or the first day of the calendar month following the retiree's 65th birthday, whichever is later.

(3) A retiree who becomes eligible for minimum retiree optional life insurance coverage or dependent life insurance coverage as provided in §81.5(c)(5) of this chapter [~~title~~] (relating to Eligibility), may apply for approval of such coverage by providing evidence of insurability acceptable to the system.

(4) Enrollments and applications to change coverage become effective as provided in paragraph (2) of this subsection unless other coverages are in effect at that time. If other coverages are in effect at that time, coverage or waiver of coverage becomes effective on the first day of the month following the date of approval of retirement by the Employees Retirement System of Texas; or, if cancellation of the other coverages preceded the date of approval of retirement, the first day of the month following the date the other coverages were canceled.

(5) (No change.)

(d) Surviving dependents

(1) Provided that the required premiums are paid or deducted, the health and dental insurance coverages of a surviving dependent may be continued on the death of the deceased employee or retiree if the dependent is eligible for such coverage as provided by §81.5(f) of this chapter [~~title~~] (relating to Eligibility).

(2) A surviving spouse who is receiving an annuity shall make premium payments by deductions from the annuity as provided in §81.3(b)(2)(A) of this chapter [~~title~~] (relating to Administration). A surviving spouse who is not receiving an annuity may make payments as provided in §81.3(b)(2)(B) of this chapter [~~title~~].

(e) Former COBRA unmarried children. A former COBRA unmarried child must provide an application to continue health and dental insurance coverage within 30 days after the date the notice of eligibility is mailed by the system. Coverage becomes effective on the first day of the month following the month in which continuation coverage ends. Premium payments may be made as provided in §81.3(b)(2)(B) of this chapter (relating to Administration).

(f) Premium conversion plans.

(1) An eligible employee participating in the Program [~~program~~] is deemed to have elected to participate in the premium conversion plan and to pay insurance premium expenses with pre-tax dollars as long as the employee remains on active duty. The plan is intended to be qualified under the Internal Revenue Code, §79 and §106.

(2) (No change.)

(g) Special rules for additional coverages and plans which include optional and voluntary coverages.

(1) Only an employee or retiree or a former officer or employee specifically authorized to join the Program [~~program~~] may apply for additional coverages and plans. An employee/retiree may apply for or elect additional coverages and plans without concurrent enrollment in health coverage provided by the Program. [~~program. A member of the Texas National Guard or any of the reserve components of the United States armed forces who is assigned to active military duty and who is enrolled in additional coverages and plans may cancel health coverage and retain all other coverages and plans during the period of such assignment.~~] Additional coverages and plans, as determined by the board, may include:

(A) - (E) (No change.)

(F) long-term care; [~~or~~]

(G) health care and dependent care reimbursement; or [~~.~~]

(H) TRICARE Supplement.

(2) An eligible participant in the Program [~~program~~] and eligible dependents may participate in an approved HMO if they reside in the approved service area of the HMO and are otherwise eligible under the terms of the contract with the HMO.

(3) - (5) (No change.)

(h) Changes in coverage after the initial period for enrollment.

(1) - (3) (No change.)

(4) The evidence of insurability provision applies only to:

(A) - (B) (No change.)

(C) employees, retirees, or eligible dependents who wish to enroll in HealthSelect of Texas after the initial period for enrollment, except as provided in subsections (a), (g)(4)-(5), and (h)(6)-(9) of this section and §81.3(b)(3)(B) of this chapter [~~title~~] (relating to Administration);

(D) employees enrolled in the Program [~~program~~] whose coverage was waived, dropped or canceled, except as otherwise provided in subsection (k) of this section; and

(E) (No change.)

(5) (No change.)

(6) A participant who is enrolled in an [~~a~~] approved HMO and who permanently moves out of the HMO service area shall make one of the following elections, to become effective on the first day of the month following the date on which the participant moves out of the HMO service area:

(A) (No change.)

(B) if the participant and all covered dependents are not eligible to enroll in an approved HMO; either:

(i) (No change.)

(ii) enroll in an approved HMO if the participant is eligible, and drop any ineligible covered dependent, unless not in compliance with §81.11(a)(2) of this chapter [~~title~~] (relating to Termination of Coverage).

(7) When a covered dependent of a participant permanently moves out of the participant's HMO service area, the participant shall make one of the following elections, to become effective on the first day of the month following the date on which the dependent moves out of the HMO service area:

(A) drop the ineligible dependent, unless not in compliance with §81.11(a)(2) of this chapter (relating to Termination of Coverage);

(B) - (C) (No change.)

(8) An eligible participant will be allowed an annual opportunity to make changes in coverages.

(A) A participant will be allowed to:

(i) - *(viii)* (No change.)

(ix) enroll themselves and their eligible dependents in an eligible HMO and in a dental plan from a waived [~~declined~~] or canceled status;

(x) add, decrease or cancel eligible coverage, unless prohibited by §81.11(a)(2) of this chapter (relating to Termination of Coverage); [~~and~~]

(xi) apply for coverage for which evidence of insurability is required as provided in paragraph (3) of this subsection; and [~~.~~]

(xii) waive health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage).

(B) Surviving dependents and former COBRA unmarried children are not eligible for the provisions in subparagraph (A)(iv), (vii), [~~or~~] (viii), (ix), or (xii) of this paragraph, except that a surviving dependent or former COBRA unmarried child may enroll an eligible dependent in dental insurance coverage if the dependent is enrolled in health insurance coverage.

(C) Such opportunity will be scheduled prior to September 1 of each year at times announced by the system. Coverage selected during the annual enrollment period will be effective September 1. [~~An employee who re-enrolled after the close of the annual opportunity but prior to September 1 of the same calendar year shall have until August 31 of that calendar year to make changes as allowed above to be effective September 1.~~]

(9) (No change.)

(i) Preexisting conditions exclusion. The preexisting conditions exclusion shall apply to employees who enroll in disability coverage. The exclusion for benefit payments shall not apply after the first

six consecutive months that the employee has been actively at work or after the employee's disability coverage has been continuously in force for 12 months for a preexisting condition, as defined in §81.1 of this chapter [~~title~~] (relating to Definitions). The preexisting conditions exclusion will not apply to a medical condition resulting from congenital or birth defects.

(j) (No change.)

(k) Re-enrollment in the Program [~~program~~].

(1) - (3) (No change.)

(l) Continuing coverage in special circumstances.

(1) (No change.)

(2) Continuation of coverages for employees in a leave without pay status.

(A) An employee in a leave without pay status may continue the coverages in effect on the date the employee entered that status for the period of leave, but not more than 12 months. The employee must pay premiums directly as provided in §81.3(b)(2)(B)(i) of this chapter [~~title~~] (relating to Administration).

(B) An employee whose leave without pay is a result of the Family and Medical Leave Act of 1993 will continue to receive the state contribution during such period of leave without pay. The employee must pay premiums directly as defined in §81.3(b)(2)(B)(i) of this chapter [~~title~~]. Failure to make the required payment of premiums by the due date will result in the cancellation of all coverages except for member only health and basic life coverage. The employee will continue in the health plan in which he or she was enrolled immediately prior to the cancellation of all other coverages. If a premium beyond the state contribution for member only health and basic life coverage is owed, the employee must make the required payment of premiums directly to the employing department upon return to active duty.

(3) Continuation of coverages for a former member or employee of the Legislature [~~legislature~~]. Provided that the required premiums are paid, the health, dental, and life insurance coverages of a former member or employee of the Legislature [~~legislature~~] may be continued on conclusion of the term of office or employment.

(4) Continuation of coverages for a former judge. A former state [~~State~~] of Texas judge, who is eligible for judicial assignments and who does not serve on judicial assignments during a period of one calendar month or longer, may continue the coverages that were in effect during the calendar month immediately prior to the month in which the former judge did not serve on judicial assignments. These coverages may continue for no more than 12 continuous months during which the former judge does not serve on judicial assignments as long as, during the period, the former judge continues to be eligible for assignment.

(5) Continuation of health and dental coverage for a surviving spouse and/or dependent child/children of a deceased employee or retiree. The surviving spouse and/or dependent child/children of a deceased employee/retiree, who, in accordance with §81.5(k)(1) of this chapter [~~title~~], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the employee/retiree dies, provided all group insurance premiums due for the month in which the employee/retiree died and for the election/enrollment period have been paid in full.

(6) Continuation of health and dental coverage for a covered employee whose employment has been terminated, voluntarily or involuntarily (other than for gross misconduct), whose work hours have been reduced such that the employee is no longer eligible for the Program [~~program~~] as an employee, or whose coverage has ended following the maximum period of leave without pay as provided in paragraph (2)(A) of this section. An employee, his or her spouse and/or dependent child/children, who, in accordance with §81.5(k)(2) of this chapter [~~title~~], elects to continue health and dental coverages may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the employee's coverage ends, provided all group insurance premiums due for the month in which the coverage ends and for the election/enrollment period have been paid in full.

(7) Continuation of health and dental coverage for a spouse who is divorced from an employee/retiree and/or the spouse's dependent child/children. The divorced spouse and/or the spouse's dependent child/children (not provided for by §81.5(a) of this chapter [~~title~~]) of an employee/retiree who, in accordance with §81.5(k)(4) of this chapter [~~title~~], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the divorce decree is signed, provided all group insurance premiums due for the month in which the divorce decree is signed and for the election/enrollment period have been paid in full.

(8) Continuation of health and dental coverage for a dependent child under 25 years of age who marries. A dependent child under 25 years of age who marries and who, in accordance with §81.5(k)(5) of this chapter [~~title~~], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child's marriage occurred, provided all group insurance premiums due for the month in which the dependent child's marriage occurred and for the election/enrollment period have been paid in full.

(9) Continuation of health and dental coverage for a dependent child who has attained 25 years of age. A 25-year-old dependent child (not provided for by §81.5(d) of this chapter [~~title~~] of an employee/retiree who, in accordance with §81.5(k)(6) of this chapter [~~title~~], elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child of the employee/retiree attains 25 years of age, provided all group insurance premiums due for the month in which the dependent child attained age 25 and for the election/enrollment period have been paid in full.

(10) Extension of continuation of health and dental coverages for certain spouses and/or dependent child/children of former

employees who are continuing coverage under the provisions of paragraph (6) of this subsection.

(A) The surviving spouse and/or dependent child/children of a deceased former employee, who, in accordance with §81.5(k)(7)(A) of this chapter [~~title~~] (relating to Eligibility), elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to the Employees Retirement System of Texas. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the former employee died.

(B) A spouse who is divorced from a former employee and/or the divorced spouse's dependent child/children, who, in accordance with §81.5(k)(7)(B) of this chapter [~~title~~] (relating to Eligibility), elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to the Employees Retirement System of Texas. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the divorce decree was signed.

(C) A dependent child under 25 years of age who marries, who, in accordance with §81.5(k)(7)(C) of this chapter [~~title~~] (relating to Eligibility), elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to the Employees Retirement System of Texas. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the dependent child marries.

(D) A dependent child who has attained 25 years of age, who, in accordance with §81.5(k)(7)(D) of this chapter [~~title~~] (relating to Eligibility), elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to the Employees Retirement System of Texas. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the dependent child attained age 25.

(11) Continuation coverage defined. Continuation coverage as provided for in paragraphs (5)-(10) of this subsection means the continuation of only health and dental coverage benefits which meet the following requirements.

(A) (No change.)

(B) Period of coverage. The coverage shall extend for at least the period beginning on the first day of the month following the date of the cessation of coverage event and ending not earlier than the earliest of the following:

(i) (No change.)

(ii) in the case of loss of coverage due to termination of an employee's employment, reduction in work hours, or end of maximum period of leave without pay, if the employee, spouse, or dependent child has been certified by the Social Security Administration as being disabled as provided in §81.5(k)(3) of this chapter [~~title~~], the last day of the 29th calendar month of the continuation period;

(iii) - (iv) (No change.)

(v) the date on which coverage ceases under the plan due to failure to make timely payment of any premium required as provided in §81.3(b)(2)(B)(ii) and (iii) of this chapter [~~title~~] (relating to Administration);

(vi) - (viii) (No change.)

(C) Premium requirements. The premium for a participant during the continuation coverage period will be 102% of the employee's/retiree's health and dental coverages only rate and is payable as provided in §81.3(b)(2)(B)(ii) of this chapter [~~title~~] (relating to Administration).

(i) The premium for a participant eligible for 36 months of coverage will be 102% of the employee's/retiree's health and dental coverages only rate for the 19th through 36th months of coverage and is payable as provided in §81.3(b(2)(B)(ii) of this chapter [~~title~~] (relating to Administration).

(ii) The premium for a participant eligible for 29 months of coverage will be 150% of the employee's/retiree's health and dental coverages only rate for the 19th through 29th months of coverage and is payable as provided in §81.3(b)(2)(B)(iii) of this chapter [~~title~~] (relating to Administration).

(D) No requirement of insurability. No evidence of insurability is required for a participant who elects to continue coverage under the provisions of §81.5(k)(1)-(6) of this chapter [~~title~~] (relating to Eligibility).

(E) (No change.)

(12) (No change.)

§81.8. Waiver of Health Coverage.

(a) Eligibility. An individual eligible to participate in the Program may elect to waive health coverage in the method and form specified by the System:

(1) during the initial period of eligibility;

(2) after a qualifying life event; or

(3) during annual enrollment.

(b) Re-enrollment in health coverage. An individual who has waived health coverage is subject to the eligibility and enrollment provisions of this chapter, including evidence of insurability requirements, should the individual elect to apply for health coverage in the Program.

(c) Incentive Credit.

(1) An employee or retiree eligible to participate in the Program and who waives health coverage may be eligible for an incentive credit in lieu of the state contribution up to the amount specified in the General Appropriations Act if the individual:

(A) would otherwise have been eligible to receive the state contribution; and

(B) demonstrates, in a manner specified by the System, coverage by another health benefit plan with substantially equivalent coverage to the basic plan; or

(C) is eligible for and enrolled in the TRICARE military health system.

(2) The incentive credit may be applied only toward the cost of:

(A) eligible optional coverage, as determined by the System; or

(B) TRICARE Supplement for participants under age 65.

(3) Coverage under the TRICARE Supplement will be canceled at the end of the month in which the participant reaches the age of 65. A participant whose TRICARE Supplement is canceled will have the incentive credit applied, if applicable, toward eligible optional coverage in which the participant is currently enrolled.

(4) Notwithstanding any other provisions of this chapter, optional coverage is not considered voluntary coverage for purposes of the incentive credit in lieu of the state contribution.

(d) Solely with regard to eligible participants waiving health coverage to enroll in the TRICARE Supplement, this Section shall become effective only after the Board has contracted with one or more Carriers to make a TRICARE Supplement health coverage plan available pursuant to §81.3(c) of this chapter (relating to Administration).

§81.9. Grievance Procedure.

(a) Except for persons enrolled in an HMO or the TRICARE Supplement plan, any person participating in the insurance program, who is denied payment of insurance benefits, or otherwise receives an adverse decision, may request the carrier or administering firm to reconsider the claim. Any additional documentation in support of the claim may be submitted with the request for reconsideration. If the claim is again denied, the claim, accompanied by all related documents and copies of correspondence with the insurance carrier or administering firm [~~company~~], may be submitted by the person to the Executive Director of the Employees Retirement System of Texas for review. A request for review must be filed by the person in writing within 90 days from the date the insurance carrier or administering firm [~~company~~] formally denies the claim, or provides notice of other adverse decision, and mails notice of this denial and right of appeal to the person.

(b) Any participant with a grievance regarding eligibility or other matters involving the Program [~~program~~], including eligibility for participation in the premium conversion plan, may submit a written request to the Executive Director to make a determination on the matter in dispute.

(c) (No change.)

(d) Any participant that does not accept the Executive Director's decision may appeal the decision to the board provided the decision grants a right of appeal. A notice of appeal to the board must be [~~filed~~] in writing and filed with ERS 30 days from the date the Executive Director's decision is mailed by certified or first class mail.

(e) - (g) (No change.)

§81.11. Termination of Coverage.

(a) Cancellation of coverage.

(1) (No change.)

(2) Court ordered health coverage for a dependent cannot be canceled unless the dependent is no longer eligible as a dependent as defined in §81.1 of this chapter [~~title~~], the court order is no longer valid, or comparable coverage has been obtained.

(3) - (5) (No change.)

(b) (No change.)

(c) Sanctions for Insurance Program Violations.

(1) (No change.)

(2) Any person with a grievance regarding eligibility or other matters involving the Program [~~program~~] may submit a written request to the Executive Director to make a determination on the matter in dispute. Any person who disputes a rescission of coverage, a denial of benefits or other sanctions imposed in connection with a determination made under Insurance Code, Chapter 1551, may appeal the determination in accordance with §81.9 of this chapter [~~title~~] (relating to Grievance Procedure). A timely appeal of a determination made pursuant to Insurance Code, Chapter 1551 shall automatically stay the imposition of sanctions. However, at the time such a determination is made pursuant to Insurance Code, Chapter 1551, no further claims will be paid until the agency decision is final. Upon final agency action, all eligible claims will be processed subject to any offsets for overpayments made by the carrier.

(3) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200601019
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 867-7421

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PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §329.1

The State Employee Charitable Campaign Policy Committee (SPC) proposes an amendment to §329.1, concerning audit and review requirements. The proposed amendment to §329.1 requires certain charitable organizations to include a copy of an IRS Form 990 with their applications. The SPC requires the IRS Form 990 to assist in determining the percentage of a charitable organization's budget that was used for administrative expenses during the time period being reported in the application.

The proposed amendment to §329.1, provides a similar requirement for organizations participating in the statewide SECC campaign that §330.1 provides for the local SECC campaigns and requires an IRS Form 990 from all organizations applying to participate in the statewide SECC campaign. The SPC seeks to adopt rules that allow for consistent campaign practices at the local level and the statewide level to the extent that is feasible. The SPC is charged with ensuring a fair and equitable campaign. The IRS Form 990 is a broadly recognized and accepted form used for determining administrative costs of most non-profit charitable organizations, including those with small budgets and those with larger budgets. The SPC may adopt a requirement that all organizations submit an IRS Form 990 to ensure all organizations are reviewed fairly and consistently and to ensure that organizations that are approved to participate in the SECC spend donations within the statutory limits.

Mr. Kevin Van Oort, designated Certifying Officer for the State Employee Charitable Campaign Policy Committee, has determined that for the first five-year period the rules will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. Van Oort also has determined that for each year of the first five years these rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to help ensure that the donations of state employees to participating charitable organizations are going to the programs for which they are intended and not to unreasonably high administrative costs. There will be no effect on small or micro businesses. There are no significant anticipated economic costs to persons who are required to comply with the proposed rules.

Comments on the proposal may be submitted to Kevin Van Oort, c/o SECC State Campaign Manager, United Ways of Texas, 3724 Executive Center Drive, Suite 210, Austin, Texas 78731.

These amendments are proposed under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the proposed rule is Government Code, §659.146, regarding eligibility criteria for charitable organizations to participate in the state employee charitable campaign and the authority of the SPC to use outside expertise and resources to determine an organization's eligibility to participate in the SECC.

§329.1. Audit and Review Requirements.

(a) To be eligible to participate in the state employee charitable campaign, if the charitable organization's budget:

(1) is not more than $100,000, the organization shall provide a completed Internal Revenue Service (IRS) Form 990 and an accountant's review that offers full and open disclosure of the organization's internal operations; or

(2) is greater than $100,000, the organization shall be audited annually in accordance with generally accepted auditing standards of the American Institute of Certified Public Accountants. A copy of the report of such audit shall be provided with the application along with a completed Internal Revenue Service (IRS) Form 990.

(b) When a charitable organization submits an audit or accountant's review, a copy of the organization's most recent annual audit or accountant's review must be included with the application. The audit or accountant's review must cover the fiscal year ending not more than 18 months prior to the January of the campaign year in which the organization is applying for participation. The IRS Form 990 and audit or accountant's review must cover the same fiscal period. If the revenue and expenses on these two documents differ, the reconciliation must be included in the IRS Form 990 itself or be included in a letter of reconciliation submitted by the certified public accountant who completed the audit or accountant's review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600990
Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 475-0387

CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §330.1

The State Employee Charitable Campaign Policy Committee (SPC) proposes an amendment to §330.1, concerning audit and review requirements. The proposed amendment to §330.1 requires certain charitable organizations to include a copy of an IRS Form 990 with their applications. The SPC requires the IRS Form 990 to assist in determining the percentage of a charitable organization's budget that was used for administrative expenses during the time period being reported in the application.

The proposed amendment to §330.1, provides a similar requirement for organizations participating in the local SECC campaigns that §329.1 provides for the statewide campaign and requires an IRS Form 990 from all organizations applying to participate in an SECC campaign. The SPC seeks to adopt rules that allow for consistent campaign practices at the local level and the statewide level to the extent that is feasible. The SPC is charged with ensuring a fair and equitable campaign. The IRS Form 990 is a broadly recognized and accepted form used for determining administrative costs of most non-profit charitable organizations, including those with small budgets and those with larger budgets. The SPC may adopt a requirement that all organizations submit an IRS Form 990 to ensure all organizations are reviewed fairly and consistently and to ensure that organizations that are approved to participate in the SECC spend donations within the statutory limits.

Kevin Van Oort, designated Certifying Officer for the State Employee Charitable Campaign Policy Committee, has determined that for the first five-year period the rules will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. Van Oort also has determined that for each year of the first five years these rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to help ensure that the donations of state employees to participating charitable organizations are going to the programs for which they are intended and not to unreasonably high administrative costs. There will be no effect on small or micro businesses. There are no significant anticipated economic costs to persons who are required to comply with the proposed rules.

Comments on the proposal may be submitted to Kevin Van Oort, c/o SECC State Campaign Manager, United Ways of Texas, 3724 Executive Center Drive, Suite 210, Austin, Texas 78731.

These amendments are proposed under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the proposed rule is Government Code, §659.146, regarding eligibility criteria for charitable organizations to participate in the state employee charitable campaign and the authority of the SPC to use outside expertise and resources to determine an organization's eligibility to participate in the SECC.

§330.1. Audit and Review Requirements.

(a) To be eligible to participate in the state employee charitable campaign, if the charitable organization's budget:

(1) is not more than $100,000, the organization shall provide a completed Internal Revenue Service (IRS) Form 990 and an accountant's review that offers full and open disclosure of the organization's internal operations; or

(2) is greater than $100,000, the organization shall be audited annually in accordance with generally accepted auditing standards of the American Institute of Certified Public Accountants. A copy of the report of such audit shall be provided with the application along with a completed Internal Revenue Service (IRS) Form 990.

(b) When a charitable organization submits an audit or accountant's review, a copy of the organization's most recent annual audit or accountant's review must be included with the application. The audit or accountant's review must cover the fiscal year ending not more than 18 months prior to the January of the campaign year in which the organization is applying for participation. The IRS Form 990 and audit or accountant's review must cover the same fiscal period. If the revenue and expenses on these two documents differ, the reconciliation must be included in the IRS Form 990 itself or be included in a letter of reconciliation submitted by the certified public accountant who completed the audit or accountant's review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

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Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.3

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §421.3, concerning minimum standards set by the TCFP, in Chapter 421, entitled Standards for Certification. The proposed amendment adds position descriptions for Fire Service Instructor I, II, and III, which had not previously existed in §421.3.

The TCFP has determined the amendment to be in compliance with Texas Government Code, §419.022(b).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no significant fiscal impact on state or local governments. Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be greater clarity regarding the position descriptions for the Fire Service Instructor positions. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments must be received within 30 days of publication of this proposal in the *Texas Register*.

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032, which provides the TCFP with the authority to prescribe the means of presenting evidence of the fulfillment of the qualifications for appointment as fire protection personnel.

Cross reference to statute: Texas Government Code, §419.008 and §419.032.

§421.3. Minimum Standards Set by the Commission.

(a) (No change.)

(b) Functional position descriptions.

(1) - (9) (No change.)

(10) Fire Service Instructor I personnel. The following general position description for Fire Service Instructor I personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor I operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: deliver instruction effectively from a prepared lesson plan, including use of instructional aids and evaluation instruments; adapt lessons plans to the unique requirements of both students and the authority having jurisdiction; organize the learning environment so that learning is maximized; and meet the record-keeping requirements of the authority having jurisdiction.

(B) Competency. A Fire Service Instructor I must demonstrate competency in delivering instruction in an environment organized for efficient learning while meeting the record-keeping needs of the authority having jurisdiction, utilizing skills in accordance

with the objectives in Chapter 8 of the commission's Certification Curriculum Manual.

(11) Fire Service Instructor II personnel. The following general position description for Fire Service Instructor II personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor II operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel and Fire Service Instructor I: develop individual lesson plans for a specific topic including learning objectives, instructional aids, and evaluation instruments; schedule training sessions based on the overall training plan of the authority having jurisdiction; and supervise and coordinate the activities of other instructors.

(B) Competency. A Fire Service Instructor II must demonstrate competency in developing individual lesson plans; scheduling training sessions; and supervising other instructors, utilizing skills in accordance with the objectives in Chapter 8 of the commission's Certification Curriculum Manual.

(12) Fire Service Instructor III personnel. The following general position description for Fire Service Instructor III personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor III operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel and Fire Service Instructor II: develop comprehensive training curricula and programs for use by single or multiple organizations; conduct organizational needs analysis; and develop training goals and implementation strategies.

(B) Competency. A Fire Service Instructor III must demonstrate competency in developing comprehensive training curricula and programs; conducting organizational needs analysis; and developing training goals and implementation strategies, utilizing skills in accordance with the objectives in Chapter 8 of the commission's Certification Curriculum Manual.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601025
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 936-3821

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CHAPTER 425. FIRE SERVICE INSTRUCTORS

37 TAC §425.13

The Texas Commission on Fire Protection (TCFP) proposes new §425.13, concerning individuals serving as a coordinator prior to March 1, 2006, in Chapter 425, entitled Fire Service Instructors. The purpose of the proposed new rule is to provide, for a limited period of time, a qualifying path to advance to Fire Service Instructor III certification for those individuals serving as facility coordinators prior to March 1, 2006.

The proposed new rule provides that for one year only from March 1, 2006, individuals who possess a Fire Service Instructor II certification will be eligible to be certified for Fire Service Instructor III after meeting certain requirements. The individual must submit an application for certification to the commission and provide documentation from the head of a fire department or other organization that the individual: 1) has been assigned or is currently assigned as a chief training officer or coordinator of record; and 2) has demonstrated the minimum job performance requirements of National Fire Protection Association (NFPA) Standards 1041, entitled *Standard for Fire Service Instructor Professional Qualifications.*

The TCFP has determined this new rule to be in compliance with Texas Government Code §419.022(b).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed new rule is in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed new rule is in effect, the public benefit anticipated as a result of enforcing the new rule will be the assurance that fire service instructors in the state are trained to the highest standards. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed new rule.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments must be received within 30 days of publication of this proposal in the *Texas Register.*

The new rule is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.022, which provides the TCFP with authority to establish minimum educational, training, physical, and mental standards; and Texas Government Code, §419.028(3), which provides the TCFP with the authority to certify persons as qualified fire protection personnel instructors under conditions which the TCFP prescribes.

Texas Government Code, §§419.008, 419.022, and 419.028 are affected by this rulemaking.

§425.13. Individuals Serving as a Coordinator Prior to March 1, 2006.

For a period of one year only from March 1, 2006, an individual is eligible to be certified for Fire Instructor III after meeting the following requirements:

(1) possession of a Fire Instructor II certification; and

(2) documentation submitted to the commission in the form of a letter from the head of a department or organization verifying that the individual has:

(A) been assigned for a period of 12 months minimum to a training facility as a chief training officer or a coordinator of record (as defined in 37 TAC §421.5 relating to Definitions), or is currently assigned as a chief training officer or a coordinator of record; and

(B) demonstrated the minimum job performance requirements of National Fire Protection Association (NFPA) Standards

1041 (Standard for Fire Service Instructor Professional Qualifications), Chapter 6, (2003 edition); and

(3) submission of an application for certification as a Fire Instructor III.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200601026
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 936-3821

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CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (TCFP) proposes amendments to §431.11 and §431.201, concerning minimum standards for arson investigator certification and fire investigator certification, in Chapter 431, entitled Fire Investigation. The purpose of the proposed amendments is to remedy a problem which currently exists in which individuals who hold certification as an arson investigator would lose their arson investigator certification if their commission as a peace officer is no longer sponsored by a legal jurisdiction. The proposed amendments would remove, for these individuals, the necessity of going through fire investigator training and testing again, as it is essentially the same training and testing they had already taken to become an arson investigator.

The proposed amendment to §431.11, Minimum Standards for Arson Investigator Certification for Law Enforcement Personnel, adds a provision that commission-certified fire investigators will qualify for similar-level arson investigator certification if they are a law enforcement officer employed or commissioned by a law enforcement agency as a peace officer, and if they are designated as an arson investigator by an appropriate local authority.

The proposed amendment to §431.201, Minimum Standards for Fire Investigation Personnel, changes the procedure by which individuals who have previously held arson investigator certification, but no longer hold a current commission as a peace officer, would be able to qualify for fire investigator certification of a similar level. As the rule is currently written, such an individual would have to submit an application for certification form and fee. The proposed change would automatically identify such an individual as a fire investigator in the commission's database, and would only require the application form and fee if the individual wished to obtain a printed certificate.

The TCFP has determined these amendments to be in compliance with Texas Government Code, §419.022(b).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be a larger pool of certified fire investigators able to respond to incidents requiring a determination of fire cause, and the assurance that such incidents will be investigated by a fire investigator holding a current certification, and not an arson investigator who may not realize that his certification is no longer valid through a technicality.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments must be received within 30 days of publication of this proposal in the *Texas Register.*

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.11

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022, which provides the TCFP with authority to establish minimum educational, training, physical, and mental standards.

Texas Government Code, §419.008 and §419.022 are affected by this rulemaking.

§431.11. Minimum Standards for Arson Investigator Certification for Law Enforcement Personnel.

(a) A law enforcement officer employed or commissioned by a law enforcement agency as a peace officer who is designated as an arson investigator by an appropriate local authority is eligible for certification on a voluntary basis by complying with this chapter.

(b) An individual holding commission certification as a fire investigator who becomes a law enforcement officer employed or commissioned by a law enforcement agency as a peace officer, and who is designated as an arson investigator by an appropriate local authority will qualify for a similar level arson investigator certificate. To obtain a printed certificate the individual must make application to the commission to include confirmation of commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601027
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 936-3821

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.201

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022, which provides the TCFP with authority to establish minimum educational, training, physical, and mental standards.

Texas Government Code, §419.008 and §419.022 are affected by this rulemaking.

§431.201. Minimum Standards for Fire Investigation Personnel.

(a) - (d) (No change.)

(e) Individuals who previously held arson investigator certification, who no longer hold a current commission as a peace officer, will qualify [~~may apply~~] for certification as a fire investigator of similar level upon notice to the commission. To obtain a printed certificate the individual will be required to make application to the commission. [~~in accordance with this subchapter.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 437. FEES

37 TAC §§437.1, 437.3, 437.5, 437.7, 437.11, 437.13

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§437.1, 437.3, 437.5, 437.7, 437.11, and 437.13, in Chapter 437, entitled Fees. The purpose of the proposed amendments is to simplify and clarify fee submission procedures and to provide a penalty to be assessed for paying fees with a check that is returned for insufficient funds.

The proposed amendment to §437.1 adds a provision that fees submitted in the form of a check that is returned for insufficient funds will invalidate the certification, seal or test for which the fees were collected.

The proposed amendments to §§437.3, 437.5, 437.7, 437.11, and 437.13 remove the requirement that fees submitted for different purposes (certifications, renewals, purchasing a manual, copying fees, etc.) not be combined when submitted. The proposed amendments would allow fees to be combined into a single payment.

In addition to the deleted provision referred to in the previous paragraph, the proposed amendment to §437.13 also clarifies in subsection (a) that the non-refundable fee of $15 charged for examinations administered by the commission is a processing fee; and adds performance skill examinations to those examinations for which the processing fee shall be charged. These changes in subsection (a) make subsection (c) obsolete, and it is being deleted.

The TCFP has determined the amendments to be in compliance with Texas Government Code, §419.022(b) and §419.026(a).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendments are in effect there will be no significant fiscal impact on state and local governments or small businesses.

Mr. Soteriou has also determined that for each of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be the simplification of fee submission procedures, as well as a reduction in the time commission staff must take to process and collect fees when checks are returned for insufficient funds. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendments.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments must be received within 30 days of publication of this proposal in the *Texas Register.*

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.026, which provides the TCFP with authority to set and collect a fee of not more than $35 for each certificate that the TCFP issues or renews.

Texas Government Code, §419.008 and §419.026 are affected by this rulemaking.

§437.1. Purpose and Scope.

(a) - (b) (No change.)

(c) If a fee submitted in the form of a check is returned for insufficient funds the certification, seal or test for which the fee was collected will be invalidated.

§437.3. Certification Fees.

(a) (No change.)

[~~(b) Certification fees shall not be combined with other fees such as renewal fees, fees for commission manuals, or copying fees.~~]

(b) [~~(c)~~] The regulated employing entity shall be responsible for all certification fees required as a condition of appointment.

(c) [~~(d)~~] Nothing in this section shall prohibit an individual from paying a certification fee for any certificate which he or she is qualified to hold, providing the certificate is not required as a condition of appointment (see subsection (b) [~~(c)~~] of this section concerning certification fees).

(d) [~~(e)~~] Any person who holds a certificate, and is no longer employed by an entity that is regulated by the commission may submit in writing a request together with the required fee to receive a one time certificate stating the level of certification in each discipline held by the person on the date that person left employment pursuant to the Texas Government Code, §419.033(b). Multiple certifications may be listed on the one-time certificate. The one-time fee for the one-time certificate shall be the same as the current certification fee provided in subsection (a) of this section.

(e) [~~(f)~~] A facility that provides basic level training for any discipline for which the commission has established a Basic Curriculum must be certified by the commission. The training facility will be charged a separate certification fee for each discipline.

§437.5. Renewal Fees.

(a) (No change.)

~~[(b) Renewal fees shall not be combined with other fees, such as certification fees, fees for commission manuals, and copying fees.]~~

(b) [~~(c)~~] A regulated employing entity shall pay the renewal fee for all certificates which a person must possess as a condition of employment.

(c) [~~(d)~~] If a person re-enters the fire service whose certificate(s) has been expired for less than one year, the regulated entity must pay all applicable renewal fee(s) and any applicable additional fee(s). Upon payment of the required fees, the certificates previously held by the individual, for which he or she continues to qualify, will be renewed.

(d) [~~(e)~~] If a person reapplies for a certificate(s) which has been expired less than one year and the individual is not employed by a regulated employing entity, as defined in subsection (b) [~~(c)~~] of this section, the individual must pay all applicable renewal fee(s) and any applicable additional fee(s). Upon payment of the required fee(s), the certificate(s) previously held by the individual, for which he or she continues to qualify, will be renewed.

(e) [~~(f)~~] Nothing in this section shall prohibit an individual from paying a renewal fee for any certificate which he or she is qualified to hold providing the certificate is not required as a condition of employment.

(f) [~~(g)~~] Certification renewal statements will be mailed to all regulated employing entities at least 60 days prior to October 31 of each calendar year. Certification renewal statements will be mailed to certified training facilities at least 60 days prior to February 1 of each calendar year. Certification renewal statements will be mailed to individuals holding certification at least 60 days prior to April 30 of each calendar year.

(g) [~~(h)~~] All certification renewal fees must be returned with the renewal statement to the commission.

(h) [~~(i)~~] All certification renewal fees must be paid on or before the renewal date posted on the certification renewal statement to avoid additional fee(s).

(i) [~~(j)~~] The certification period shall be a period not to exceed one year. The certification period for employees of regulated employing entities is November 1 to October 31. The certification period of certified training facilities is February 1 to January 31. The certification period of Individual certificate holders is May 1 to April 30.

(j) [~~(k)~~] Individual certificate holders that possess a certification that expires on October 31 will receive a renewal statement during the regulated entity's renewal cycle for a six month renewal period to align that individual to the individual holding certification renewal cycle as defined in subsection (i) [~~(j)~~] of this section.

(k) [~~(l)~~] A regulated entity that hires an individual holding certification that is current and has a renewal expiration date of April 30 will receive a renewal statement during the individual holding certification renewal cycle to align the renewal period as defined in subsection (i) [~~(j)~~] of this section.

(l) [~~(m)~~] All certification renewal fees received from one to 30 days after the renewal date posted on the renewal notice will cause the individual or entity responsible for payment to be assessed a non-refundable $10 late fee in addition to the renewal fee for each individual for which a renewal fee was due.

(m) [~~(n)~~] All certification renewal fees received more than 30 days after the renewal date posted on the renewal notice will cause the individual or entity responsible for payment to be assessed a non-refundable $20 late fee in addition to the renewal fee for each individual for which a renewal fee was due.

(n) [~~(o)~~] In addition to any non-refundable late fee(s) assessed for certification renewal, the commission may hold an informal conference to determine, if any, further action(s) are to be taken.

(o) [~~(p)~~] An individual or entity may petition the commission for a waiver of the late fees required by this section if the person's certificate expired because of the individual or regulated employing entity's good faith clerical error, or expired as a result of termination of the person's employment where the person has been restored to employment through a disciplinary procedure or a court action. All required renewal fees including applicable late fees and all required continuing education must be submitted before the waiver request may be considered.

(1) Applicants claiming good faith clerical error must submit a sworn statement together with any supporting documentation that evidences the applicant's good faith efforts to comply with commission renewal requirements and that failure to comply was due to circumstances beyond the control of the applicant.

(2) Applicants claiming restoration to employment as a result of a disciplinary or court action must submit a certified copy of the order restoring the applicant to employment.

(p) [~~(q)~~] An individual, upon returning from activation to military service, whose certification has expired, must notify the commission in writing. The individual will have any normally associated late fees waived and will be required to pay a $25 renewal fee.

§437.7. Standards Manual and Certification Curriculum Manual Fees.

(a) - (b) (No change.)

~~[(c) Manual fees shall not be combined with certification fees or renewal fees.]~~

(c) [~~(d)~~] The commission does not provide printed copies of the manuals. A printed copy of the commission's standards may be obtained from the West Group, 610 Opperman Drive, Eagan, MN, 55123, (800) 328-9352, by requesting "Title 37, Public Safety and Corrections" of the Texas Administrative Code. The web address for West Group is www.westgroup.com.

§437.11. Copying Fees.

(a) - (c) (No change.)

~~[(d) Copying fees shall not be combined with renewal fees or certification fees. Copying fees may be combined with commission standards manual fees and commission certification curriculum manual fees.]~~

§437.13. Basic Certification Examination Fees.

(a) A non-refundable processing fee of $15 shall be charged for each written or performance skill examination administered by the commission.

~~[(b) Examination fees will not be combined with any other fees, such as renewal fees, fees for commission manuals, and copying fees.]~~

~~[(c) A non-refundable fee of $15 shall be charged for each performance skills examination administered at a training facility providing field examiners. If the skills examination is administered at Austin, or other place designated by the commission, a non-refundable fee of $50 shall be charged.]~~

(b) [~~(d)~~] Academy testing fees will be paid in advance with the students' application to test or be billed after the state testing has been completed. The exceptions to this rule are:

(1) individual walk-ins; and

(2) skills retests administered the same day.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gary L. Warren, Sr.
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Texas Commission on Fire Protection
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CHAPTER 441. CONTINUING EDUCATION

37 TAC §441.9

The Texas Commission on Fire Protection (TCFP) proposes an amendment to §441.9, concerning continuing education for aircraft rescue fire fighting personnel, in Chapter 441, entitled Continuing Education. The purpose of the proposed amendment is to reflect a reference change in Federal Aviation Regulation (FAR) 139.319.

The proposed amendment changes the reference to FAR 139.319 from "(j)(2) and (3)" to "(i)(2) and (3)."

The TCFP has determined the amendment to be in compliance with Texas Government Code, §419.022(b).

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be up-to-date citations to federal regulations in commission rules. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed amendment.

Comments on the proposal may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments must be received within 30 days of publication of these proposals in the *Texas Register.*

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with the authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.022, which provides the TCFP with authority to establish minimum educational, training, physical, and mental standards; and Texas Government Code, §419.032(b), which provides the TCFP with the authority to establish minimum qualifications relating to continuing education programs and other matters that relate to the competence and reliability of persons to assume and discharge the responsibilities of fire protection personnel, and to prescribe the means of presenting evidence of fulfillment of those qualifications.

Texas Government Code, §§419.008, 419.022, and 419.032(b) are affected by this rulemaking.

§441.9. Continuing Education for Aircraft Rescue Fire Fighting Personnel.

(a) (No change.)

(b) Continuing education must, at a minimum, meet the specific training requirements of FAR 139.319(i)[~~(j)~~](2) and (3) (pertaining to Aircraft Rescue and Fire Fighting Operational Requirements). Continuing education required by this subsection may exceed 20 hours, if necessary, to complete all required subjects.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 5. FINANCE

SUBCHAPTER F. TRANSPORTATION DEVELOPMENT CREDIT PROGRAM

43 TAC §§5.70 - 5.74

The Texas Department of Transportation (department) proposes Title 43, Chapter 5, new Subchapter F, §§5.70 - 5.74, concerning the Transportation Development Credit Program.

EXPLANATION OF PROPOSED SECTIONS

Title 23, USC, §120, as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, SAFETEA-LU (Pub. L. No. 109-59)(2005) (SAFETEA-LU), permits a state to use certain toll revenue expenditures, transportation development credits, formerly called toll credits, as a credit toward the non-Federal share of all programs authorized by Title 23, with the exception of emergency relief programs and for transit programs authorized by Title 49, Chapter 53. Transportation development credits are designed to encourage states to increase capital investment in infrastructure; to increase the flexibility of state transportation finance programs; and to enable states to more effectively utilize existing resources. The Texas Transportation Commission (commission) has a statutory obligation to enhance existing sources of revenue and to create alternate sources of revenue. The department proposes the adoption of rules concerning transportation development credits to implement the applicable laws.

New §5.70, Purpose, identifies the applicable federal law and states its purpose and also states that the proposed rules are intended to specify the procedures and conditions by which an entity may be eligible for award of transportation development credits and how the commission may award credits.

New §5.71, Definitions, defines "commission," "department," "eligible entity," "eligible project," "executive director," "locally earned credits," and "transportation development credits."

The term "eligible entity" is defined as any entity that is eligible for funding under Title 23, USC or Title 49, Chapter 53, USC and is in good standing with the department and has no deficiencies or findings of noncompliance. It is defined in the manner that conforms to the applicable federal law and states the basic requirement of good standing for any entity wishing to do business with the department. The requirement that an entity be in good standing with the department will ensure that the department enhances existing sources of revenue; that it maximizes the generation of revenue from existing assets of the department; and, that it increases the role of local and regional leaders in solving the state's transportation problems by rewarding those entities in good standing.

The term "eligible project" is defined as highway, rail, transit, bicycle or pedestrian projects, as authorized by Title 23, USC, other than the emergency relief programs authorized by §125, and Title 49, Chapter 53, USC, as amended by SAFETEA-LU. This is consistent with the department's plan to encourage development of new mobility opportunities and transportation solutions that will enhance transportation by roads and highways or serve as an alternate to traditional modes of transportation.

The term "locally earned credits" is defined as transportation development credits earned from a project of a regional tollway authority; a project of a county acting under Transportation Code, Chapter 284; a project of a regional mobility authority; an international bridge not owned by the state; and a department project located within the geographic area of a regional mobility authority that has developed one or more toll projects. This reflects the department's goal to empower local and regional leaders to solve local and regional transportation problems, and to reward local and regional efforts to solve transportation problems.

The term "transportation development credits" is defined as a financing tool approved by the Federal Highway Administration (FHWA) that allows states to use their federal obligation authority without the requirement of non-federal matching dollars. Credits are earned when the state, a toll authority, or a private entity funds a capital transportation investment with toll revenues earned on existing toll facilities, excluding revenues needed for debt service, returns to investors or the operation and maintenance of toll facilities. The term describes a revenue tool, formerly called toll credits, that allows states to use their federal obligation authority without the requirement of non-federal matching dollars, thus expanding the resources available to the department as well as the department's local and regional partners.

New §5.72, describes the competitive process by which the commission will award 75% of the state's locally earned transportation development credits. The commission has expressed its intention to empower local and regional leaders to solve local and regional transportation problems. The commission award of 75% of the available transportation development credits by a competitive process will encourage local and regional entities to compete with one another to define and solve local and regional transportation problems, develop and implement transportation projects, create regional mobility authorities, and provide local and regional leadership to help the department solve statewide transportation problems.

Subsection 5.72(d), Program call, describes the manner in which the department will solicit proposals for the competitive award of credits by periodically publishing a solicitation notice in the *Texas Register*.

Subsection 5.72(e), Proposal, describes the requirements of a proposal submitted in response to a solicitation published by the department. The commission has expressed its commitment to a plan for faster completion of transportation projects with additional money to get the job done right. The plan has five goals: 1) reduce congestion; 2) enhance safety; 3) expand economic opportunity; 4) improve air quality; and, 5) increase the value of transportation assets. The plan is based on four strategies: 1) use new financial options to build transportation projects; 2) empower local and regional leaders to solve local and regional transportation problems; 3) increase competitive pressure to drive down the cost of transportation projects; and, 4) demand consumer driven decisions that respond to traditional market forces. The proposal must provide a detailed description of the need for the project and how the award of transportation development credits for the project will meet the requirements of the commission's plan for statewide transportation.

Subsection 5.72(f), Award, describes the manner in which the commission will consider proposals and projects submitted in response to a published notice soliciting proposals. The subsection enumerates the criteria that the commission will use in awarding transportation development credits in a manner that expands the availability of funding for transportation projects, reduces congestion, expands economic opportunity, enhances safety, improves air quality and increases the value of transportation assets. The subsection reflects how the commission will reward local and regional efforts to help the department complete transportation projects faster and to help the department's efforts to reduce congestion, enhance safety, expand economic opportunity, improve air quality, and increase the value of transportation assets. Subsection 5.72(f) also adds the requirement that the local and regional leaders must coordinate proposals and proposed projects with the local metropolitan planning organization if the project falls within the boundaries of the metropolitan planning organization for the purpose of obtaining the organization's concurrence on the proposal or proposed project. The requirement for metropolitan planning organization concurrence will demonstrate to the commission that the project has regional support.

Subsection 5.72(g), Unused credits, describes how the commission will determine if credits are being utilized in a manner that maximizes the value of the credits for the benefit of the department's statewide transportation plan. Any transportation development credits that cannot be awarded to a region due to a lack of eligible projects or credits that have been previously awarded, but after one year remain unused, shall be available for discretionary award by the commission. This requirement is consistent with the commission's statutory obligation to enhance existing sources of revenue and to create alternate sources of revenue that can be applied to transportation projects.

New §5.73, Discretionary award, describes the process by which the commission will make discretionary awards of transportation development credits. By maintaining discretionary control over 25% of the available transportation development credits,

the commission will be able to exercise its role as the state's leader in the plan to resolve the state's transportation problem and to maintain its responsibility to plan and approve transportation projects that will benefit the entire state.

Subsection 5.73(b), Award, describes the commission's discretionary award of credits and is consistent with the same criteria used to make transportation development credit award determinations for the competitive process. The subsection also adds the requirement that the local and regional leaders must coordinate proposals and proposed projects with the local metropolitan planning organization if the project falls within the boundaries of the metropolitan planning organization for the purpose of obtaining the organization's expressed opinion on the proposal or proposed project.

Subsection 5.73(c), Unused credits, states that if an entity awarded credits does not sign the required agreement within one year of award, the commission may award those credits to another entity.

New §5.74, Administration, states that an entity awarded transportation development credits shall enter into a project agreement with the department and shall comply with other requirements specified by the executive director. These requirements are consistent with the department's other requirements related to doing business with the department.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Mr. Bass has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Bass has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be the potentially increased availability of state or local funds that would otherwise be required to pay the federal government as local match for eligible projects. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 10:30 a.m. on March 31, 2006 in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 10:00 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed new sections may be submitted to James Bass, Chief Financial Officer, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on April 10, 2006.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code §201.101.

§5.70. Purpose.

Section 120 of Title 23, USC, as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59 (2005), permits a state to use certain toll revenue expenditures, known as transportation development credits, as a credit toward the non-federal share of certain programs. This subchapter specifies the procedures and conditions by which an entity may be eligible for award of transportation development credits and the procedures and conditions by which the commission may otherwise award transportation development credits.

§5.71. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Department--The Texas Department of Transportation.

(3) Eligible entity--Any entity that is eligible for funding under Title 23, USC or Chapter 53 of Title 49, USC and is in good standing with the department and has no deficiencies or findings of noncompliance.

(4) Eligible project--Highway, rail, transit, bicycle or pedestrian projects, as authorized by Title 23, USC, other than the emergency relief programs authorized by §125 of Title 23, and by Chapter 53 of Title 49, USC, as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59 (2005).

(5) Executive director--The executive director of the Texas Department of Transportation, or his or her designee.

(6) Locally earned credits--Transportation development credits earned from:

(A) a project of a regional tollway authority;

(B) a project of a county acting under Transportation Code, Chapter 284;

(C) a project of a regional mobility authority;

(D) an international bridge not owned by the state; and

(E) a department project located within the geographic area of a regional mobility authority that has developed one or more toll projects.

(7) Transportation development credits--A financing tool approved by the Federal Highway Administration (FHWA) that allows states to use their federal obligation authority without the requirement of non-federal matching dollars. Credits are earned when the state, a toll authority, or a private entity funds a capital transportation investment with toll revenues earned on existing toll facilities, excluding revenues needed for debt service, returns to investors or the operation and maintenance of toll facilities.

§5.72. Competitive Process.

(a) Purpose. The commission will award 75% of the state's locally earned credits in accordance with this section.

(b) Awarding credits to region. Except as provided in subsection (g) of this section, the commission will award credits under this section to projects within the region from which they were earned. For purposes of this section, "region" means the planning boundaries of the metropolitan planning organization.

(c) Eligible project. A highway project is not eligible for award under this section unless the proposer demonstrates that the project provides direct support of a rail, transit, bicycle or pedestrian project.

(d) Program call. The department will periodically publish a notice in the *Texas Register* soliciting proposals for the award of transportation development credits under this section.

(e) Proposal.

(1) An eligible entity may submit a proposal for an eligible project in response to a notice published under subsection (d) of this section. The proposal must include a detailed description of:

(A) the project and the need for the project;

(B) how the award of transportation development credits will expand the availability of funding for transportation projects;

(C) how the project will:

(i) reduce congestion;

(ii) expand economic opportunity;

(iii) enhance safety;

(iv) improve air quality; and

(v) increase the value of transportation assets.

(2) If the project is located within the planning boundaries of a metropolitan planning organization, the eligible entity must obtain the concurrence of the metropolitan planning organization.

(3) The executive director may require supplemental information to clarify the issues described in paragraph (1) of this subsection.

(f) Award.

(1) The commission will not consider a project unless the project has been endorsed by the applicable metropolitan planning organization.

(2) The commission will award transportation development credits under this section after considering the potential of the project to:

(A) expand the availability of funding for transportation projects;

(B) reduce congestion;

(C) expand economic opportunity;

(D) enhance safety;

(E) improve air quality; and

(F) increase the value of transportation assets.

(g) Unused credits.

(1) If an entity awarded credits under this section does not sign an agreement under §5.74 of this subchapter (relating to Administration) within one year of award, unused credits shall be available for discretionary award under §5.73 of this subchapter (relating to Discretionary Award).

(2) If, after three program calls, the department has not received enough eligible projects to use credits available to a region under this section, the unused credits shall be available for discretionary award under §5.73 of this subchapter.

§5.73. Discretionary Award.

(a) Purpose. The commission will award non-locally earned credits and 25% of the state's locally earned credits in accordance with this section. The commission may award credits under this section through a competitive process as described in §5.72 of this subchapter (relating to Competitive Process), or on its own motion, at its discretion.

(b) Award. The commission will award transportation development credits under this section based on the criteria described in §5.72(e) of this subchapter. If the project is located within the planning boundaries of a metropolitan planning organization, the commission will also consider the expressed opinion, if any, of the metropolitan planning organization.

(c) Unused credits. If an entity awarded credits under this section does not sign an agreement under §5.74 of this subchapter (relating to Administration) within one year of award, the commission may award those credits to another entity under this section.

§5.74. Administration.

An entity awarded transportation development credits under this subchapter shall enter into a project agreement with the department and shall comply with all terms and conditions required by the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) proposes the repeal of §31.3, §31.61, §31.62, §31.64, and §31.65 and simultaneously proposes new §31.3, §31.61, and §31.62, concerning the rail fixed guideway system state safety oversight program.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTIONS

The Federal Transit Administration (FTA) adopted new regulations governing Rail Fixed Guideway Systems, State Safety Oversight. The new regulations are published in Title 49 CFR Part 659 and are entitled: Rail Fixed Guideway Systems; State Safety Oversight. New provisions specify the department responsibility of adopting requirements that address the elements identified in 49 CFR Part 659. In accordance with the federal regulation, new proposed §31.3, §31.61 and §31.62 require the rail fixed guideway systems to adhere to the provisions outlined in the federal regulations.

In 1991, Congress required that the FTA establish a program providing for the state-conducted oversight of the safety and security of rail systems not regulated by the Federal Railroad Administration (FRA), by enacting a statute in Title 49 USC §5330. FTA published final regulations to implement the federal statute in 1995 and the final rule went into effect January 26, 1996. In 1997, the Texas Legislature enacted a state statute, Transportation Code, §455.005, requiring state compliance with Title 49 USC §5330. In enacting the state statute in May 1997, the Texas Legislature adopted the compliance requirements set out in the FTA regulations in effect at the time. The department adopted rules to further implement the statute in September 1997. The state statute states that its purpose is to ensure state compliance with the federal statute published in Title 49 USC §5330.

The FTA amended its regulations that implement the federal statute and published final regulations on April 29, 2005. The final regulations became effective on May 31, 2005 and the date by which states are required to comply is May 1, 2006.

FTA's new final regulations contain compliance requirements that are more stringent and more specific than the requirements stated in its former regulations. The regulations are more specific in that the FTA no longer requires compliance with standards published in a transportation association manual, rather the new rule enumerates the specific compliance standards.

The department proposes the repeal of §31.3 and simultaneously proposes new §31.3 in a revised form. New §31.3, Definitions, proposes new terms that match terms used in the new federal regulations.

The new federal regulations spell out the requirements formerly stated in the American Public Transportation Association (APTA) Manual and guidelines, instead of incorporating the requirements by reference. The FTA determined that it is in the interest of users to publish all of the provisions of the APTA Manual in the state safety oversight regulation, so reference to APTA guidelines must be deleted. The new federal regulations were intended to improve the performance of the State Safety Oversight Program and to ensure the following outcomes: (1) enhance program efficiency; (2) increase responsiveness to recommendations from the National Transportation Safety Board (NTSB) and emerging safety and security issues; (3) improve consistency in the collection and analysis of accident causal factors through increased coordination with other federal reporting and investigation programs; and (4) improve performance of the hazard management process. The regulation also clarifies FTA's oversight management objectives, and streamlines current reporting requirements. The regulations also address heightened concerns for rail transit security and emergency preparedness.

Terms no longer used in the federal regulations include references to "APTA," "hazardous condition," and "unacceptable hazardous condition," as those terms were used in the manual. New provisions are proposed in order for the state to comply with the federal statute and the regulations that implement the statute. New terms and definitions are included to reflect the new federal regulations: "corrective action plan," "FRA," "hazard," "individual," "investigation," "new starts project," "passenger operations," "program standard," "rail accident," "rail transit accident," "rail transit contractor," "rail transit controlled property," "rail transit fixed guideway system," "rail transit passenger," "rail transit vehicle," "security," "system safety program plan," and "system security plan." The definitions have been renumbered to reflect the deletions and additions detailed above.

The department proposes the repeal of §31.61 and simultaneously proposes new §31.61 in a revised form. New §31.61, Rail Transit Agency Responsibilities, proposes new provisions to comply with the federal regulations published in 49 CFR Part 659.

New §31.61(a) sets out the requirements for each rail transit agency to develop and implement a system safety program that complies with the federal regulations. Rail transit agencies are required to develop and maintain a separate system safety program plan that complies with the requirements specified in the federal regulations.

New §31.61(b) sets out the requirements for each rail transit agency to develop and implement a system security plan that complies with the new federal regulations.

New §31.61(c) requires each rail transit agency to perform an annual review of its system safety program and its system security plan that complies with the new federal regulations.

New §31.61(d) requires the rail transit authority to maintain ongoing internal safety and security reviews that complies with the new federal regulations.

New §31.61(e) requires the rail transit agency to develop and document a hazard management process that complies with the new federal regulations. The rail transit agency hazard management process must be part of its system safety program plan, to be reviewed and approved by the department. The rail transit agency must develop, in coordination with the department, thresholds for the notification and reporting of hazards to the department. Measures to eliminate or control hazards and the associated corrective actions are to be managed through the hazard management process, including rail transit agency procedures for providing the department with reports to track mitigation. The rail transit agency's hazard management process must include, at a minimum, a definition of the rail transit agency's

approach to the hazard management and resolution process, a list of the sources and mechanisms used to support the ongoing identification of hazards, the process by which identified hazards will be evaluated and prioritized for elimination or control, the mechanism used to track identified hazards to resolution, and the process for ongoing reporting of hazard resolution activities to the department.

New §31.61(f) requires the rail transit agency to notify the department of accidents, including a fatality, injuries requiring immediate medical attention and property damage, in accordance with federal regulations. FTA has modified the thresholds for the notification and investigation of accidents. Rail transit agencies are required to report the occurrence of accidents within two (2) hours. In those instances where the rail transit agency shares track with the general railroad system and is subject to FRA notification requirements, the rail transit agency must notify the department within two (2) hours of an incident for which FRA is notified. The department must investigate, or cause to be investigated, all accidents meeting the notification and investigation thresholds.

New §31.61(g) requires the transit agency to develop and implement corrective action plans that comply with the new federal regulations. The department must review and approve all procedures, except those used by the NTSB that will be used to conduct an investigation on its behalf. The rail transit agency is required to develop corrective action plans to address findings from accidents and the department's three-year safety and security review. In the case of accident investigations, the department is responsible for ensuring that a corrective action plan is developed, implemented, and tracked, regardless of the entity that conducts the investigation on the state's behalf. The provisions identify a dispute resolution process for matters related to corrective action plan requirements.

The provisions in §31.62, State Responsibilities, are proposed for repeal because they set out the department's responsibilities for reporting and compliance with the new federal regulations, in 49 CFR Part 659. The provisions state internal requirements for the department and are therefore not required to be adopted as a rule.

The department proposes the repeal of §31.64, Contractors for Rail Fixed Guideway Transit Agencies, because the provisions covered under this section are now listed in the elements contained in 49 CFR Part 659 and the requirements are reflected under the new proposed §31.61.

The department proposes the repeal of §31.65, Deadlines, and simultaneously proposes new §31.62, Deadlines, reflecting the requirements outlined in the new federal regulations, 49 CFR Part 659.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals and new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Eric Gleason, Director, Public Transportation Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT

Mr. Gleason has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be compliance with federal regulations and with state law, and ensuring the safety and security of rail fixed guideway systems. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals and new sections may be submitted to Eric Gleason, Director, Public Transportation Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on April 10, 2006.

SUBCHAPTER A. GENERAL

43 TAC §31.3

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules governing rail fixed guideway system safety oversight.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §455.005.

§31.3. Definitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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43 TAC §31.3

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules governing rail fixed guideway system safety oversight.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §455.005.

§31.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative expenses--Include, but are not limited to, general administrative expenses such as salaries of the project director, secretary, and bookkeeper; insurance premiums or payments to a self-insurance reserve; office supplies; facilities and equipment rental; and standard overhead rates.

(2) Allocation--A preliminary distribution of grant funds representing the maximum amount to be made available to a subrecipient during the fiscal year, subject to the subrecipient's completion of and compliance with all application requirements, rules, and regulations applicable to the specific funding program.

(3) Authority--A metropolitan or regional authority created under Transportation Code, Chapter 451 or 452, or a city transit department created under Transportation Code, Chapter 453, by a municipality having a population of not less than 200,000 according to the most recent federal census.

(4) Average revenue vehicle capacity--The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(5) Capital expenses--Include the acquisition, construction, and improvement of public transit facilities and equipment needed for a safe, efficient, and coordinated public transportation system.

(6) Commission--The Texas Transportation Commission.

(7) Common rule--49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(8) Contractor--A recipient of public transportation funds through a contract with the department.

(9) Corrective action plan--A plan developed by the rail transit agency that describes the actions the rail transit agency will take to minimize, control, correct, or eliminate hazards, and the schedule for implementing those actions.

(10) Department--The Texas Department of Transportation.

(11) Deputy executive director--The deputy executive director of the department.

(12) Designated recipient--The state, an authority, a municipality that is not included in an authority, a local governmental body, or a nonprofit entity providing rural public transportation services, that receives federal or state public transportation money through the department or the Federal Transit Administration, or its successor.

(13) Director--The director of public transportation for the department.

(14) District--One of the 25 districts of the department having responsibility for administration of public transportation programs in a designated geographic area.

(15) District engineer--The chief executive officer in charge of a district.

(16) Equipment--Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(17) Executive director--The chief executive officer of the department.

(18) Fatality--A death that results from an incident and that occurs within 30 days following the incident.

(19) Federally funded project--A public transportation project that is being funded in part under the provisions of the Federal Transit Act, as amended, 49 USC §5301 et seq., the Federal-Aid Highway Act of 1973, as amended, 23 USC §101 et seq., or any other federal program for funding public transportation.

(20) Fiscal year--The state accounting period of 12 months that begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

(21) FRA--The Federal Railroad Administration, an agency of the United States Department of Transportation.

(22) FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.

(23) Good standing--A status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

(24) Hazard--Any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.

(25) Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

(26) Individual--A passenger; employee; contractor; other rail transit facility worker; pedestrian; trespasser; or any person on rail transit controlled property.

(27) Injury--Any physical damage or harm that occurs to an individual as a result of an incident and that requires immediate medical attention away from the scene.

(28) Investigation--The process used to determine the causal and contributing factors of an accident or hazard, so that actions can be identified to prevent recurrence.

(29) Like-kind exchange--The trade-in or sale of a transit vehicle before the end of its useful life to acquire a replacement vehicle of like kind.

(30) Local funds--Directly generated funds, as defined in the latest edition of the Federal Transit Administration National Transit Database Reporting Manual. Examples include, but are not limited to, passenger fares, special transit fares, purchased transportation fares, park and ride revenue, other transportation revenue, charter service revenue, freight tariffs, station and vehicle concessions, advertising revenue, funds dedicated to transit at their source, taxes, cash contributions, contract revenue, general revenue, and in-kind contributions.

(31) Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, metropolitan transit authority, or regional transit authority.

(32) Local public body--Includes cities, counties, and other political subdivisions of states; public agencies; and instrumentalities of one or more states, municipalities, or political subdivisions of states.

(33) Local share requirement--The amount of funds required and eligible to match federally funded projects for the improvement of public transportation.

(34) MPO--Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(35) Net operating expenses--Those expenses that remain after operating revenues are subtracted from eligible operating expenses.

(36) New starts project--Any rail fixed guideway system funded under FTA's 49 U.S.C. 5309 discretionary construction program.

(37) Nonprofit organization--A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 USC §501(c), one that is exempt from taxation under 26 USC §504(a) or §101, or one that has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the nonprofit organization.

(38) Nonurbanized area--An area outside an urbanized area.

(39) Obligated funds--Monies made available under a valid, unexpired contract between the department and a public transportation subrecipient.

(40) Operating expenses--Costs directly related to system operations of a transit agency regardless of the category of funding. At a minimum, this definition includes:

(A) fuel, oil, replacement tires, replacement parts that do not meet the criteria for capital items, drivers' and mechanics' salaries and fringe benefits, dispatchers' salaries, and licenses;

(B) maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism; and

(C) expenses funded with capital or administrative funds, including preventative maintenance, provision of paratransit service under the Americans with Disability Act (ADA), capital cost of contracting, and insurance.

(41) Passenger operations--The period of time when any aspects of rail transit agency operations are initiated with the intent to carry passengers.

(42) Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivisions of the state; public agencies or instrumentalities of one or more states; Indian tribes (except private nonprofit corporations formed by Indian tribes); public corporations, boards, or commissions established under the law of any state; or entities subject to control by public authority, whether state or municipal.

(43) Program standard--A written document developed and distributed by the oversight agency, that describes the policies, objectives, responsibilities, and procedures used to provide rail transit agency safety and security oversight.

(44) Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

(45) Property damage--The dollar amount required to replace any vehicle, whether transit or non-transit, and any property or facility damaged during an incident, or to repair it to a state equivalent to the state that existed before the incident.

(46) Public transportation--Transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance. This definition includes fixed guideway transportation and underground transportation, but excludes services provided by aircraft, taxicabs, ambulances, and emergency vehicles.

(47) Rail transit accident--An incident involving a rail fixed guideway transit vehicle or taking place on rail fixed guideway transit controlled property where one or more of the following occurs:

(A) A fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail fixed guideway transit-related incident;

(B) Injuries requiring immediate medical attention away from the scene for two or more individuals;

(C) Property damage to rail fixed guideway transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds $25,000;

(D) An evacuation due to life safety reasons;

(E) A collision at a grade crossing;

(F) A main-line derailment;

(G) A collision with an individual on a rail fixed guideway right of way; or

(H) A collision between a rail fixed guideway transit vehicle and a second rail fixed guideway transit vehicle, or a rail fixed guideway transit non-revenue vehicle.

(48) Rail transit agency--An entity operating a rail fixed guideway system.

(49) Rail transit contractor--An entity that performs tasks required on behalf of the oversight or rail transit agency. The fixed guideway system may not be a contractor for the oversight agency.

(50) Rail transit controlled property--Property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.

(51) Rail transit fixed guideway system--Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway, as determined by the FTA, that:

(A) is not regulated by the Federal Railroad Administration; and

(B) is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 U.S.C. 5336); or

(C) has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336).

(52) Rail transit passenger--A person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.

(53) Rail transit vehicle--The rail transit agency's rolling stock, including, but not limited to passenger and maintenance vehicles.

(54) Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(55) Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual

agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(56) Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(57) Revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be revenues.

(58) Ridership--Unlinked passenger trips.

(59) Ridesharing activities--Transportation provided by rubber-tired vehicles that carry no fewer than 10 nor more than 15 passengers and that are operated on a nonprofit basis.

(60) Rural public transportation (RPT)--A generic term used to identify subrecipients who provide service in nonurbanized areas.

(61) Rural transit district--A political subdivision of the state that provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458.

(62) Safety-- Freedom from harm resulting from unintentional acts or circumstances.

(63) Security-- Freedom from harm resulting from intentional acts or circumstances. Intentional danger includes crimes and must be reported the department if the intentional act meets the thresholds for notification.

(64) Stakeholders--All individuals or groups that are potentially affected by transportation decisions. Examples include public agencies, representatives of transportation agency employees or other affected employees, private providers of transportation, non-governmental agencies, local businesses, persons in diverse and traditionally underserved communities, and other interested parties.

(65) Strategic priorities--Projects that the commission has determined will:

(A) stabilize funding levels;

(B) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or

(C) advance the level of coordination among transportation service providers, and among transportation service providers and health and human services agencies.

(66) Subrecipient--An entity that receives FTA assistance from the department, rather than directly from FTA.

(67) System safety program plan--A document developed by the rail transit agency, describing its safety policies, objectives, responsibilities, and procedures.

(68) System security plan--A document developed by the rail transit agency describing its security policies, objectives, responsibilities, and procedures.

(69) Uniform grant and contract management standards--The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(70) Unlinked passenger trips--The number of passengers who board public transportation vehicles. A passenger is counted each time the passenger boards a vehicle even though the passenger might be on the same journey from origin to destination.

(71) Urban transit district--In accordance with Transportation Code, Chapter 458, a local governmental body or a political subdivision of the state that operates a public transportation system in an urbanized area with a population between 50,000 and 200,000, according to the most recent federal census. This definition includes small urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994.

(72) Urbanized area--A core area and the surrounding densely populated area with a population of 50,000 or more, with boundaries fixed by the United States Census Bureau.

(73) Vehicle miles--The miles a vehicle travels while in revenue service, plus deadhead miles. This definition excludes miles a vehicle travels for charter service, school bus service, operator training, or maintenance testing.

(74) Vehicle revenue hours or miles--The hours or miles a vehicle travels while in revenue service. This definition includes layover and recovery, but excludes travel to and from storage facilities, the training of operators prior to revenue service, road tests, deadhead travel, and school bus and charter service.

(75) Vehicle utilization--Average daily passenger trips per revenue vehicle, divided by average revenue vehicle capacity. This definition provides a measure of an individual system's ability to use existing seating capacity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. RAIL SAFETY OVERSIGHT PROGRAM

43 TAC §§31.61, 31.62, 31.64, 31.65

STATUTORY AUTHORITY

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules governing rail fixed guideway system safety oversight.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §455.005.

§31.61. Rail Transit Agency Responsibilities.

§31.62. State Responsibilities.

§31.64. Contractors for Rail Transit Agencies.

§31.65. Deadlines.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. RAIL FIXED GUIDEWAY SYSTEM STATE SAFETY OVERSIGHT PROGRAM

43 TAC §31.61, §31.62

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules governing rail fixed guideway system safety oversight.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §455.005.

§31.61. Rail Transit Agency Responsibilities.

(a) System safety program plan. The rail transit agency shall develop and implement a written system safety program plan that complies with the requirements of this section. The system safety plan shall include, at a minimum, the following documents.

(1) A policy statement signed by the agency's chief executive that endorses the safety program and describes the authority that establishes the system safety program plan.

(2) A clear definition of the goals and objectives for the safety program and stated management responsibilities to ensure they are achieved.

(3) An overview of the management structure of the rail transit agency, including:

(A) an organization chart;

(B) a description of how the safety function is integrated into the rest of the rail transit organization; and

(C) clear identification of the lines of authority used by the rail transit agency to manage safety issues.

(4) The process used to control changes to the system safety program plan, including:

(A) specifying an annual assessment of whether the system safety program plan should be updated; and

(B) required coordination with the department, including timeframes for submission, revision, and approval.

(5) A description of the specific activities required to implement the system safety program, including:

(A) tasks to be performed by the rail transit safety function, by position and management accountability, specified in matrices and/or narrative format; and

(B) safety-related tasks to be performed by other rail transit departments, by position and management accountability, specified in matrices and/or narrative format.

(6) A description of the process used by the rail transit agency to implement its hazard management program, including activities for:

(A) hazard identification;

(B) hazard investigation, evaluation and analysis;

(C) hazard control and elimination;

(D) hazard tracking; and

(E) requirements for on-going reporting to the department relating to hazard management activities and status.

(7) A description of the process used by the rail transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment, which do not require formal safety certification but which may have safety impacts.

(8) A description of the safety certification process required by the rail transit agency to ensure that safety concerns and hazards are adequately addressed prior to the initiation of passenger operations for new starts and subsequent major projects to extend, rehabilitate, or modify an existing system, or to replace vehicles and equipment.

(9) A description of the process used to collect, maintain, analyze, and distribute safety data, to ensure that the safety function within the rail transit organization receives the necessary information to support implementation of the system safety program.

(10) A description of the process used by the rail transit agency to perform accident notification, investigation and reporting, including:

(A) notification thresholds for internal and external organizations;

(B) accident investigation process and references to procedures;

(C) the process used to develop, implement, and track corrective actions that address investigation findings;

(D) reporting to internal and external organizations; and

(E) coordination with the department.

(11) A description of the process used by the rail transit agency to develop an approved, coordinated schedule for all emergency management program activities, which include:

(A) meetings with external agencies;

(B) emergency planning responsibilities and requirements;

(C) process used to evaluate emergency preparedness, such as annual emergency field exercises;

(D) after action reports and implementation of findings;

(E) revision and distribution of emergency response procedures;

(F) familiarization training for public safety organizations; and

(G) employee training.

(12) A description of the process used by the rail transit agency to ensure that planned and scheduled internal safety reviews are performed to evaluate compliance with the system safety program plan, including:

(A) identification of departments and functions subject to review;

(B) responsibility for scheduling reviews;

(C) process for conducting reviews, including the development of checklists and procedures and the issuing of findings;

(D) review of reporting requirements;

(E) tracking the status of implemented recommendations; and

(F) coordination with the department.

(13) A description of the process used by the rail transit agency to develop, maintain, and ensure compliance with rules and procedures having a safety impact, including:

(A) identification of operating and maintenance rules and procedures subject to review;

(B) techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing;

(C) techniques used to assess the effectiveness of supervision relating to the implementation of operating and maintenance rules; and

(D) process for documenting results and incorporating them into the hazard management program.

(14) A description of the process used for facilities and equipment safety inspections, including:

(A) identification of the facilities and equipment subject to regular safety related inspection and testing;

(B) techniques used to conduct inspections and testing;

(C) inspection schedules and procedures; and

(D) description of how results are entered into the hazard management process.

(15) A description of the maintenance audits and inspections program, including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.

(16) A description of the training and certification program for employees and contractors, including:

(A) categories of safety-related work requiring training and certification;

(B) a description of the training and certification program for employees and contractors in safety-related positions;

(C) process used to maintain and access employee and contractor training records; and

(D) process used to assess compliance with training and certification requirements.

(17) A description of the configuration management control process, including:

(A) the authority to make configuration changes;

(B) process for making changes; and

(C) assurances necessary for formally notifying all involved departments.

(18) A description of the safety program for employees and contractors that incorporates the applicable local, state, and federal requirements, including:

(A) safety requirements that employees and contractors must follow when working on, or in close proximity to, rail transit agency property; and

(B) processes for ensuring the employees and contractors know and follow the requirements.

(19) A description of the hazardous materials program, including the process used to ensure knowledge of and compliance with program requirements.

(20) A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements; and

(21) A description of the measures, controls, and assurances in place to ensure that safety principles, requirements, and representatives are included in the rail transit agency's procurement process.

(b) System security plan.

(1) The rail transit agency shall implement a system security plan that, at a minimum, complies with requirements in this subsection. The system security plan must be developed and maintained as a separate document and may not be part of the rail transit agency's system safety program plan.

(2) The system security plan must, at a minimum address the following:

(A) identify the policies, goals, and objectives for the security program endorsed by the agency's chief executive;

(B) document the rail transit agency's process for managing threats and vulnerabilities during operations, and for major projects, extensions, new vehicles and equipment, including integration with the safety certification process;

(C) identify controls in place that address the personal security of passengers and employees;

(D) document the rail transit agency's process for conducting internal security reviews to evaluate compliance and measure the effectiveness of the system security plan; and

(E) document the rail transit agency's process for making its system security plan and accompanying procedures available to the department for review and approval.

(c) Annual reviews.

(1) The rail transit agency shall conduct an annual review of its system safety program plan and system security plan.

(2) In the event the rail transit agency's system safety program plan is modified, the rail transit agency must submit the modified plan and any subsequently modified procedures to the department for review and approval.

(3) In the event the rail transit agency's system security plan is modified, the rail transit agency must make the modified system security plan and accompanying procedures available to the department for review.

(d) Internal safety and security reviews.

(1) The rail transit agency shall develop and document a process for the performance of on-going internal safety and security reviews in its system safety program plan.

(2) The internal safety and security review process must, at a minimum:

(A) describe the process used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended;

(B) ensure that all elements of the system safety program plan and system security plan are reviewed in an ongoing manner and completed over a three-year cycle;

(C) the rail transit agency must notify the department at least thirty (30) days before the conduct of scheduled internal safety and security reviews;

(D) the rail transit agency shall submit to the department any checklists or procedures it will use during the safety portion of its review;

(E) the rail transit agency shall make available to the department any checklists or procedures subject to the security portion of its review;

(F) the rail transit agency shall submit an annual report documenting internal safety and security review activities and the status of subsequent findings and corrective actions. The security part of this report must be made available for department review;

(G) the annual report must be accompanied by a formal letter of certification signed by the rail transit agency's chief executive, indicating that the rail transit agency is in compliance with its system safety program plan and system security plan; and

(H) if the rail transit agency determines that findings from its internal safety and security reviews indicate that the rail transit agency is not in compliance with its system safety program plan or system security plan, the chief executive must identify the activities the rail transit agency will take to achieve compliance.

(e) Hazard management process.

(1) The rail transit agency shall develop and document in its system safety program plan a process to identify and resolve hazards during its operation, including any hazards resulting from subsequent system extensions or modifications, operational changes, or other changes within the rail transit environment.

(2) The hazard management process must, at a minimum:

(A) define the rail transit agency's approach to hazard management and the implementation of an integrated systemwide hazard resolution process;

(B) specify the sources of, and the mechanisms to support, the on-going identification of hazards;

(C) define the process by which identified hazards will be evaluated and prioritized for elimination or control;

(D) identify the mechanism used to track through resolution the identified hazards;

(E) define minimum thresholds for the notification and reporting of hazards to the department; and

(F) specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the department.

(f) Accident notification.

(1) The rail transit agency shall notify the department within two (2) hours of any incident involving a rail transit vehicle or taking place on rail transit controlled property where one or more of the following occurs:

(A) a fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail transit-related incident;

(B) injuries requiring immediate medical attention away from the scene for two or more individuals;

(C) property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds $25,000;

(D) an evacuation due to life safety reasons;

(E) a collision at a grade crossing;

(F) a main-line derailment;

(G) a collision with an individual on a rail right of way; or

(H) a collision between a rail transit vehicle and a second rail transit vehicle, or a rail transit non-revenue vehicle.

(2) The rail transit agencies that share track with the general railroad system and are subject to the Federal Railroad Administration notification requirements, shall notify the department within two (2) hours of an incident for which the rail transit agency must also notify the Federal Railroad Administration.

(g) Corrective action plans.

(1) The rail transit agency must, at a minimum, develop a corrective action plan for the following:

(A) results from investigations, in which identified causal and contributing factors are determined by the rail transit agency, or the department, as requiring corrective actions; and

(B) findings from safety and security reviews performed by the department.

(2) Each corrective action plan should identify the action to be taken by the rail transit agency, an implementation schedule, and the individual or department responsible for the implementation.

(3) The corrective action plan must be reviewed and formally approved by the department.

(4) The rail transit agency must provide the department:

(A) verification that the corrective action(s) has been implemented as described in the corrective action plan, or that a proposed alternate action has been implemented subject to department review and approval; and

(B) periodic reports requested by the department, describing the status of each corrective action not completely implemented, as described in the corrective action plan.

(5) In the event of a dispute concerning the department's decision related to a corrective action plan, a rail transit agency shall submit an application for administrative review to the following address: Director, Public Transportation Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483. The application for administrative review shall be submitted no later than 30 days after receipt of the written decision.

(A) Application. The application for administrative review shall, at a minimum:

(i) state and explain the relief requested;

(ii) state and explain all relevant facts; and

(iii) state and explain the legal basis for the relief sought.

(B) Decision. The division director shall decide whether to grant, grant in part, or deny the application. If an applicant does not provide information sufficient to evaluate the application, the application shall be denied. The applicant is not entitled to a contested case hearing, and there is no right to appeal the decision of the division director.

§31.62. Deadlines.

A rail transit agency shall submit to the department:

(1) prior to beginning revenue service, a system safety program plan required by §31.61(a) of this subchapter (relating to System safety program plan), including the system security portion of the plan required by §31.61(b) of this subchapter;

(2) by February 1 of each year, a written report of its annual internal safety audit conducted as required by §31.61(d) of this subchapter;

(3) by February 1 of each year, a certification, signed by the rail transit agency's chief executive, that the rail transit agency is in compliance with its system safety program plan and system security plan;

(4) by February 1 of each year, a written report of the rail transit agency's safety activities for the preceding 12 months as required by §31.61 of this subchapter; and

(5) by February 1 of each year, a certification signed by the rail transit agency's chief executive, that the rail transit agency is in compliance with the provisions of this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200601008
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: April 9, 2006
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 34. PUBLIC FINANCE

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PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §329.1

The State Employee Charitable Campaign withdraws the proposed amendment to §329.1 which appeared in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8648).

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600993
Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: February 24, 2006
For further information, please call: (512) 475-0387

CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §330.1

The State Employee Charitable Campaign withdraws the proposed amendment to §330.1 which appeared in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8650).

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600992
Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
Effective date: February 24, 2006
For further information, please call: (512) 475-0387

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT REGULATION

SUBCHAPTER J. AUTHORIZED LENDER'S DUTIES AND AUTHORITY

7 TAC §1.827

The Finance Commission of Texas (the commission) adopts the repeal of §1.827. The commission has determined that §1.827 has been superseded by the adoption of 7 TAC §§1.1251 - 1.1256, concerning consumer loan forms, as the latter rules were adopted to implement the amendments contained in subsection (a-1) to Texas Finance Code §341.502, as enacted by the 79th Texas Legislature in HB 1547.

The repeal is adopted without changes to the proposal published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8757).

The commission received no written comments on the proposal.

The repeal is adopted under Texas Finance Code §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code §342.551 authorizes the commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected by the adopted repeal are contained in Texas Finance Code, Chapter 342, Subchapter J.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600884
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Effective date: March 9, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 936-7640

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CHAPTER 3. STATE BANK REGULATION

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), adopts new §3.40, concerning definitions, §3.41, concerning applications, notices and reports related to foreign bank branches and agencies, and §3.44, concerning statements of registration, notices and filings related to foreign bank representative offices. The commission also adopts amendments to §3.4, concerning foreign banking, §3.21, related to bank call reports, §3.22, concerning sale or lease agreements with an officer, director, principal shareholder or affiliate, §3.34, concerning posting of notice in all financial institutions regarding requirements for certain loan agreements to be in writing, §3.35, concerning safe deposit box facilities, §3.42, concerning foreign bank agency records, §3.43, concerning credit balance of funds, §3.45, concerning records of representative office, §3.91, concerning loan production offices, §3.92, concerning user safety at unmanned teller machines, §3.111, concerning confidential information, and §3.112, concerning department charges for providing public information. The new and amended sections are adopted without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8757). The text will not be republished.

The adopted new and amended sections are explained in this preamble on a subchapter by subchapter basis. As a general matter, the adopted revisions conform terms used in the chapter to statutory definitions, replace obsolete statutory references with correct citations, update and clarify requirements, harmonize certain of the sections and governing law, and delete outdated or redundant provisions.

Subchapter A sets out and explains certain securities-related activities in which state banks and their subsidiaries may engage. The adopted amendment to §3.4 conforms the minimum capital requirement a state bank must satisfy to engage in foreign banking to the measure presently used to determine the capital adequacy of a bank.

Subchapter B sets out requirements that apply generally to state banks. The adopted amendments to §3.21, which pertains to call report requirements, delete the definitions of well-known terms that are already defined in Finance Code, §31.002, and use terminology consistent with Finance Code definitions. The adopted amendments to §3.22 reflect the language of Finance Code, §33.109, with respect to the persons to whom the requirements of that section apply. The adopted amendments to §3.34, which concerns the posting of notices regarding certain loan agreements, and §3.35, regarding imprint requirements for safe deposit box keys, use more direct language, update and correct citations and effective date provisions, and use terminology consistent with Finance Code definitions.

Subchapter C governs foreign bank operations in Texas. At the time the subchapter was adopted, foreign bank operations

were regulated under Finance Code, Chapter 39. Thereafter, the Texas Legislature repealed Chapter 39 and replaced it with new Finance Code, Chapter 204, effective September 1, 1999. Foreign bank operations are now regulated under Chapter 204.

Subchapter C was adopted before the enactment of Finance Code, Chapter 204, and its sections required revision to reflect the provisions of Chapter 204. As explained in this preamble, the adopted new and amended Subchapter C sections harmonize the subchapter with Chapter 204 and clarify certain of the department's current practices. Adopted new §3.41 and §3.44 replace previously existing §3.41 and §3.44, which sections are repealed in this issue of the *Texas Register*.

Adopted new §3.40 defines certain terms to reference Finance Code, Chapter 204. Adopted new §3.41 sets out the requirements related to the applications, notices and reports a foreign bank must file in connection with establishing and maintaining a Texas branch or agency, and reflects and incorporates the requirements of Finance Code, Chapter 204. The adopted new section retains the department's requirement that a foreign bank pay an application fee for each branch or agency it seeks to establish, but allows the banking commissioner to waive one or more of the informational requirements of the license application form if the foreign bank has already established a branch or agency in this state. Additionally, adopted new §3.41 clarifies the notice requirements that apply if a foreign bank that maintains a Texas branch or agency wishes to establish a Texas representative office. Finally, adopted new §3.41 carries forward the annual report filing requirement.

Adopted new §3.44 sets out the requirements related to the registration, notices and reports a foreign bank must file for a Texas representative office, and reflects and incorporates the requirements of Finance Code, Chapter 204. The adopted new section retains the substance of the scope and commencement of operations provisions of repealed §3.44 and the department's requirement that a foreign bank file a registration statement and pay the required fee for each Texas representative office it establishes. However, adopted new §3.44 allows the banking commissioner to waive one or more of the informational requirements of the registration form with respect to a foreign bank's additional representative offices.

The adopted amendments to §3.42, which section specifies the records that a foreign bank branch, agency or representative office must maintain, and to §3.43, which authorizes a foreign bank branch or agency to maintain credit balances, conform the sections to and reflect the requirements and limitations of Finance Code, Chapter 204 and the department's practice.

Subchapter E concerns banking house and other facilities. The adopted amendments to §3.91, which section governs the establishment of loan production offices, conform language to other proposed amendments and update statutory citations. Further, the adopted amendments broaden the section's parity provision to reflect the scope of Finance Code, §32.010, which provides parity for depository institutions in the United States and not just national banks. The adopted amendments also update §3.92, which implements the requirements of Finance Code, §§59.301 *et seq.*, related to safety at unmanned teller machines, by eliminating a dated paragraph and updating statutory citations.

Subchapter F addresses access to information held by the department. The adopted amendments to §3.111 and §3.112 update references and statutory citations.

The commission received no comments regarding the proposed new and amended sections.

SUBCHAPTER A. SECURITIES ACTIVITIES AND SUBSIDIARIES

7 TAC §3.4

The amendments are adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600870
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Effective date: March 9, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-1300

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SUBCHAPTER B. GENERAL

7 TAC §§3.21, 3.22, 3.34, 3.35

The amendments are adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Everette D. Jobe
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SUBCHAPTER C. FOREIGN BANK BRANCHES, AGENCIES AND REPRESENTATIVE OFFICES

7 TAC §§3.40 - 3.45

The amendments and new sections are adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. BANKING HOUSE AND OTHER FACILITIES

7 TAC §3.91, §3.92

The amendments are adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 475-1300

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SUBCHAPTER F. ACCESS TO INFORMATION

7 TAC §3.111, §3.112

The amendments are adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Everette D. Jobe
Certifying Official
Finance Commission of Texas
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For further information, please call: (512) 475-1300

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CHAPTER 3. STATE BANK REGULATION
SUBCHAPTER C. FOREIGN BANK AGENCIES

7 TAC §3.41, §3.44

The Finance Commission of Texas (commission), on behalf of the Texas Department of Banking (department), adopts the repeal of §3.41, concerning applications, notices and reports of a foreign bank corporation, and §3.44, concerning statement of registration, notices and filings by a representative office. The repeal is adopted without changes to the proposal as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8757).

The repealed sections are part of Subchapter C, which pertains to foreign bank operations in Texas. At the time Subchapter C was adopted, foreign bank operations were regulated under Finance Code, Chapter 39. Thereafter, the Texas Legislature repealed Chapter 39 and replaced it with new Finance Code, Chapter 204, effective September 1, 1999. Foreign bank operations are now regulated under Chapter 204, and Subchapter C required revision to harmonize its sections with Chapter 204 and clarify certain of the department's current practices regarding foreign banks with branches, agencies or representative offices in Texas.

Although most Subchapter C sections required only relatively minor conforming amendments, §3.41 and §3.44 required extensive revision because many of their requirements are now expressly included in Finance Code, Chapter 204. In accordance with the preference of the *Texas Register* when an existing section needs substantial revision, the commission determined that §3.41 and §3.44 should be repealed and replaced with new sections. Simultaneously with this repeal of existing §3.41 and §3.44, the commission is adopting new §3.41 and §3.44, and other revisions to Subchapter C, in this issue of the *Texas Register*.

The commission received no comments regarding the proposed repeal.

The repeal is adopted under Finance Code, §31.003(a), which authorizes the commission to adopt rules necessary or reasonable to implement and clarify Finance Code, Title 3, Subtitle A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600869

Everette D. Jobe
Certifying Official
Finance Commission of Texas
Effective date: March 9, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-1300

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PART 4. TEXAS DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 80. MORTGAGE BROKER AND LOAN OFFICER LICENSING

SUBCHAPTER B. PROFESSIONAL CONDUCT

7 TAC §80.9

The Finance Commission of Texas ("Finance Commission") adopts amendments to 7 TAC §80.9, concerning Required Disclosures, which requires mortgage brokers and loan officers to provide certain information to applicants describing the relationship of the applicant and mortgage broker; information as to how the mortgage broker will be compensated; and information related to the recovery fund. The purpose of the amendment is to clarify that certain fees paid to a mortgage broker may be subject to refund because of the exercise of a right of rescission under the Truth in Lending Statute, 12 U.S.C. §1600, et seq. and its implementing regulation, Regulation Z, 12 C.F.R. Part 226 or in connection with a home equity loan governed by Article XVI Section 50 of the Texas Constitution. The amendment also updates the regulation to reflect the renaming of the Texas Savings and Loan Department to the Department of Savings and Mortgage Lending and the new web address of the Department. The adoption of the amendments is without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8765).

The Finance Commission received no comments on the proposed amendments.

In a record vote held on January 25, 2006, the Mortgage Broker Advisory Committee unanimously reaffirmed its support for the amended rule as published.

The amendments are adopted under *Finance Code*, §11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under *Finance Code*, §156.102(a) and (b), which authorizes the Commissioner of the Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act. The Finance Commission interprets these sections as authorizing the adoption of rules relating to disclosure. The Finance Commission believes that the amendment is also appropriate to implement the provisions of House Bill 955 passed by the 79th Legislature relating to the change of the Department name.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600888
John Fleming
General Counsel
Texas Department of Savings and Mortgage Lending
Effective date: March 9, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-1353

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7 TAC §80.10

The Finance Commission of Texas ("Finance Commission") adopts amendments to 7 TAC §80.10, Prohibition on False, Misleading, or Deceptive Practices and Improper Dealings. The purpose of the amendments is to revise the current provisions of §80.10(e) to conform to amendments to *Finance Code* §156.201(c) made by H.B. 955 enacted by the 79th Legislature which defines a mortgage broker's obligations for loan officers sponsored by a mortgage broker. The adoption of the rule is without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8766).

The previous version of §80.10(e) has been superseded in part because of recent amendments to Finance Code §156.201(c). The previous version provided that a mortgage broker is liable for the acts of a sponsored loan officer who commits an improper act while engaging in separate business activities which relate to a mortgage transaction whether or not the mortgage broker is aware of the related transaction or activity. H.B. 955 amends *Finance Code* §156.201(c), and limits the mortgage broker responsibility to only those activities which the mortgage broker has knowledge or should have knowledge. The adopted amendments incorporate this limitation.

In addition, the adopted amendments add language to address the situation where a sponsoring mortgage broker engages another mortgage broker to work in the sponsoring mortgage broker's business. Because in this arrangement, the affiliated mortgage broker is acting in a similar capacity as a loan officer of the sponsoring mortgage broker, the amendment provides that the sponsoring mortgage broker has the same degree of responsibility.

In a record vote held on January 25, 2006, the Mortgage Broker Advisory Committee unanimously reaffirmed its support for the amended rule as published.

The Finance Commission received one comment on the rule on February 16, 2006, from Everette Anschutz on behalf of the Texas Association of Mortgage Brokers (TAMB). TAMB commented that: "As worded, the statute limits the responsibility of the mortgage broker for "any act or conduct performed by the mortgage broker or a loan officer sponsored by or acting for the mortgage broker.." To "act for is simply not the same thing as to "affiliate with". As a result, the proposed rule is confusing as written and potentially captures conduct beyond the scope of the statute."

TAMB did not offer any proposed alternative language. The commission agrees that "to act for" is narrower than "to affiliate with"; however, the commenter has either ignored or has simply overlooked the language of the rule that limits a mortgage broker's liability for "affiliation with" another mortgage broker to only those acts in which the mortgage broker participates and to those acts that the mortgage broker permits to be done in his name. The

commission believes that under controlling legal principles, a mortgage broker who allows another to operate under his name has authorized that person "to act for" that mortgage broker.

Section 80.10(e)(3) provides that a mortgage broker is liable in connection with an affiliated mortgage broker only when the sponsoring mortgage broker participates in the misleading conduct or when the sponsoring mortgage broker permits the affiliated broker to do business in the name of the sponsoring broker or in the name of the sponsoring broker's business entity. The plain meaning is that if a mortgage broker allows another to use his name or the name of his company, the mortgage broker has allowed that person to act on the mortgage broker's behalf.

The amendments are adopted under *Finance Code*, Section 11.306, which authorizes the Finance Commission to adopt mortgage broker rules as provided by Chapter 156 of the Act, and under *Finance Code*, Section 156.102(a) and (b), which authorizes the Commissioner of the Department of Savings and Mortgage Lending, subject to review and compliance with the directives of the Finance Commission, to adopt and enforce rules necessary for the intent of or to ensure compliance with the Act. The Finance Commission believes that the amendment is also appropriate to implement the provisions of H.B. 955 passed by the 79th Legislature relating to the change of the Department name. The adopted amendments affect *Finance Code* §156.201(c) relating to the liability of mortgage brokers for their loan officers and affiliates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600890
John Fleming
General Counsel
Texas Department of Savings and Mortgage Lending
Effective date: March 13, 2006
Proposal publication date: December 30, 2005
For further information, please call: (512) 475-1353

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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER D. POWERS OF CREDIT UNIONS

7 TAC §91.402

The Credit Union Commission adopts amendments to §91.402 concerning insurance for members without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7332).

The amendments specify how charges for insurance on a loan must bear a reasonable relationship to the collateral, risk and amount of the loan and that a person selling any insurance product on behalf of a credit union must be qualified and licensed under applicable State insurance licensing standards.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §123,107, which authorizes the Commission to adopt rules regarding insurance for members.

The specific section affected by the amendments is Texas Finance Code, §123.107.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600901
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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7 TAC §91.405

The Credit Union Commission adopts amendments to §91.405 concerning records retention without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7333).

The amendments revise the title of the section to more accurately reflect what the rule pertains to and corrects a typographical error.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code §123,110, which authorizes the Commission to adopt rules regarding credit union records.

The specific section affected by the amendments is Texas Finance Code, §123.110.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600900
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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7 TAC §91.409

The Credit Union Commission adopts the repeal of §91.409 concerning permanent closing of an office or operation without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7333).

This rule is being replaced by §91.5005 which updates the rule and places all rules related to closures in the same chapter.

No written comments were received on the proposed repeal.

The repeal is adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the repeal is Texas Finance Code, §122.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600895
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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SUBCHAPTER M. ELECTRONIC OPERATIONS

7 TAC §91.4001

The Credit Union Commission adopts amendments to §91.4001 concerning authority to conduct electronic operations with a nonsubstantive change made to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7334).

The amendments require credit unions to establish internal controls and an annual review of electronic system backup procedures. A section was also rewritten for clarity.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amendments is Texas Finance Code, §123.002.

§91.4001. Authority to Conduct Electronic Operations.

(a) A credit union may use, or participate with others to use, electronic means or facilities to perform any function or provide any product or service as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

(b) To optimize the use of its resources, a credit union may market and sell, or participate with others to market and sell, electronic capacities and by-products to others, provided the credit union acquired or developed these capacities and by-products in good faith as part of providing financial services to its members.

(c) If a credit union uses electronic means and facilities authorized by this rule, the credit union's board of directors must require staff to:

(1) Identify, assess, and mitigate potential risks and establish prudent internal controls, and system backup procedures; and

(2) Implement security measures designed to ensure secure operations. Such measures should take into consideration:

(A) the prevention of unauthorized access to credit union records and credit union members' records;

(B) the prevention of financial fraud through the use of electronic means or facilities; and

(C) compliance with applicable security device requirements for teller machines contained elsewhere in Chapter 91.

(d) All credit unions engaging in such electronic activities must comply with all applicable state and federal laws and regulations as well as address all safety and soundness concerns.

(e) A credit union shall review, on at least an annual basis, its system backup procedures for all electronic activities.

(f) A credit union shall not be considered doing business in this State solely because it physically maintains technology, such as a server, in this State, or because the credit union's product or services are accessed through electronic means by members located in this State.

(g) A credit union that shares electronic space, including a co-branded web site, with a credit union affiliate, or another third-party must take reasonable steps to clearly and conspicuously distinguish between products and services offered by the credit union and those offered by the credit union's affiliate, or the third-party.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600899
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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7 TAC §91.4002

The Credit Union Commission adopts amendments to §91.4002 concerning notice requirements; security review without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7334).

The amendments revise the title of the section to more accurately reflect what the rule pertains to and delete a provision regarding filing a notice by July, 1999, which is no longer applicable.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amendment is Texas Finance Code, §123.002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600898
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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SUBCHAPTER N. EMERGENCY OR PERMANENT CLOSING OF OFFICE OR OPERATION

7 TAC §91.5001

The Credit Union Commission adopts amendments to §91.5001 concerning emergency closing without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7335).

The amendments revise the title of the section to more accurately reflect what the rule pertains to and add provisions regarding maintaining a report of emergency contact information with the Department and includes backup systems in the definition of an emergency disruption.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amendments is Texas Finance Code, §122.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600897
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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7 TAC §91.5002

The Credit Union Commission adopts amendments to §91.5002 concerning effect of closing without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7336).

The amendments insert a reference to §91.5001 for clarity.

No written comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amendments is Texas Finance Code, §122.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600896
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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7 TAC §91.5005

The Credit Union Commission adopts a new §91.5005 concerning permanent closing of an office or operation without changes to the text published in the November 11, 2005, issue of the *Texas Register* (30 TexReg 7336).

The new rule updates and replaces §91.409 to place all rules related closures in the same chapter.

No written comments were received on the proposal.

The new rule is adopted under the provision of the Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code.

The specific section affected by the amendments is Texas Finance Code, §122.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

TRD-200600902

Harold E. Feeney
Commissioner
Credit Union Department
Effective date: March 13, 2006
Proposal publication date: November 11, 2005
For further information, please call: (512) 837-9236

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.15

The Texas Appraiser Licensing and Certification Board adopts an amendment to §153.15, without changes to the proposed text as published in the September 30, 2005, issue of the *Texas Register* (30 TexReg 6170) and will not be republished.

One comment was received from Foundation of Appraiser Coalition (FACT) pointing out that the wording on the proposed rule may be in conflict with the §153.15(d); however, they do not oppose the adopted rule.

The adopted amendment to §153.15, changes the time frame in which a state licensed appraiser can complete the 2,000 hours of appraisal experience for licensing as set forth in the Appraiser Qualifications Board Criteria to be no less than 12 months.

The amendment is adopted under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Texas Occupations Code, Chapter 1103), which provides the board with authority to adopt rules under §1103.151, Rules Relating to Certification and Licenses.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 17, 2006.

TRD-200600880
Wayne Thorburn
Commissioner
Texas Appraiser Licensing and Certification Board
Effective date: March 9, 2006
Proposal publication date: September 30, 2005
For further information, please call: (512) 465-3959

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.15

The Texas State Board of Examiners of Psychologists adopts amendments to §463.15, Oral Examination, with changes to the proposed text as published in the December 16, 2005, issue of the *Texas Register* (30 TexReg 8387).

The amendments are being adopted to adhere to the changes made by the 79th Texas Legislature to the section of the Psychologists' Licensing Act regarding the oral examination.

The adopted amendments will clearly define the standards used by the board to determine whether a person has demonstrated sufficient entry-level knowledge of the practice of psychology.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§463.15. Oral Examination.

(a) Application Requirements. An application for the Oral Exam includes an application form, current passport picture of the applicant and required fee.

(b) Eligibility. To be eligible for licensure as a psychologist, all provisionally licensed psychologists shall be required to take and pass the oral exam administered by the Board. Only provisionally licensed psychologists may apply to take the oral exam. The Board shall waive this requirement for Specialists of the American Board of Professional Psychology, Health Service Providers listed in the National Register and for individuals who qualify for licensure under reciprocity.

(c) A candidate for the oral examination must demonstrate sufficient entry-level knowledge of the practice of psychology to pass the exam based on the following standards:

(1) A candidate must have a total score of 64 or above from each of the two examiners to pass the exam.

(2) Scores are based on the demonstrated abilities of the candidate in nine content areas with a possible score in each content score of 9 points for a well articulated verbal answer, 8 points for a good or passing answer, 3 points for a weak, vague or incomplete answer, and minus 10 points for an answer that is substantially incomplete or incorrect.

(3) The nine content area are as follows:

(A) Identifies the problems (e.g. initial hypotheses, differential diagnoses, etc.);

(B) Identifies a specific and plausible strategy for gathering further data to refine the problem definition (e.g. psychometrics, observation data collection, etc.);

(C) Develops a realistic intervention or action plan on the basis of the initial formulation;

(D) Recognizes and can formulate an effective response to crises;

(E) Attends to cultural and diversity issues;

(F) Demonstrates awareness of professional limitations;

(G) Can recognize and apply laws which are relevant to the case;

(H) Can recognize and apply professional standards that are relevant; and

(I) Can recognize and apply ethical standards or ethical reasoning pertinent to the case.

(4) Each candidate is presented with a vignette, which is representative of a situation commonly encountered in the area of testing. Candidates are required to articulate a case formulation according to a standard or model that is generally recognized in their area of testing. Candidates are required to respond to questions associated with each vignette.

(5) Areas of psychology in which a candidate may choose to be tested are: clinical, counseling, school, neuropsychological, and industrial and organizational.

(d) In advance additional information is provided to each candidate in the form of a brochure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600994
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: March 16, 2006
Proposal publication date: December 16, 2005
For further information, please call: (512) 305-7700

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22 TAC §463.27

The Texas State Board of Examiners of Psychologists adopts amendments to §463.27, Temporary License for Person Licensed in Other States, with changes to the proposed text as published in the December 16, 2005, issue of the *Texas Register* (30 TexReg 8388).

The amendments are being adopted to adhere to the changes made by the 79th Texas Legislature to the section of the Psychologists' Licensing Act regarding licensure as a psychologist.

The adopted amendments will set requirements for an individual licensed in another state to obtain a limited temporary license in Texas.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

§463.27. Temporary License for Persons Licensed in Other States.

(a) Temporary licensure is available to applicants for a period of not longer than 30 days from the time the application is approved until the expiration of the 30 days, provided the following conditions are met by the applicant.

(1) Submission of a completed application for temporary licensure, including a brief description of the type of psychological service to be provided which is acceptable to the Board and the requested time period for the temporary license;

(2) Submission of the required fee;

(3) Submission of proof that the applicant holds current licensure to practice as a licensed psychologist or a licensed psychological associate in another state with licensing requirements substantially equivalent to the Board's;

(4) Submission of documentation directly from the state in which the applicant is currently licensed indicating that the applicant is in good standing; and

(5) The applicant provides documentation that the applicant has passed the EPPP at the Texas cut-off for the type of temporary license sought.

(b) Licensed psychologists and licensed psychological associates with temporary licenses must practice in adherence to the Board rule 465.2(h), Supervision, and may consult with the supervising Texas licensed psychologist.

(c) The specific period of time for which the applicant is issued a temporary license is stated in the Board's approval letter which issues the temporary license.

(d) Substantial equivalency of the other state may be documented by the applicant providing a copy of the other board's rules and regulations with pertinent sections highlighted which indicate training and exam requirements for a particular type of license. This material is then reviewed for substantial equivalency by the Board.

(e) This type of temporary license is not available to an applicant who has made application for permanent licensure in this state. Upon receipt of an application for a permanent license, the temporary license is immediately null and void and the individual can no longer practice legally in Texas.

(f) The holder of a temporary license will not be further notified as to the ending date of the temporary license, other than the ending date that is provided in the initial issuance letter. Practicing with an expired temporary license qualifies the licensee for disciplinary review by the Board.

(g) Purposes for which a temporary license may be issued include: to serve as an expert witness in court, to assist a patient in transition to mental health practitioner in Texas, and others as approved by the Board.

(h) Applicants for temporary licenses who hold current status as CPQ, National Health Service Provider, or ABPP may have documentation from the credentialing entity sent directly to the Board as compliance with and in lieu of subsections (a)(3) and (5).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600995

Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: March 16, 2006
Proposal publication date: December 16, 2005
For further information, please call: (512) 305-7700

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CHAPTER 473. FEES

22 TAC §473.5

The Texas State Board of Examiners of Psychologists adopts amendments to §473.5, Miscellaneous Fees, without changes to the proposed text as published in the December 16, 2005, issue of the *Texas Register* (30 TexReg 8389).

The amendments are being adopted to charge an application fee for the new temporary license.

The adopted amendments will allow the agency to recover the costs incurred in issuing a limited temporary license.

No comments were received regarding the adoption of the amendments.

The amendments are adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200600996
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: March 16, 2006
Proposal publication date: December 16, 2005
For further information, please call: (512) 305-7700

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. EXAMINATION

22 TAC §571.18

The Texas Board of Veterinary Medical Examiners adopts amendments to §571.18 concerning Provisional Licensure without change to the proposed text as published in the *Texas Register* on November 4, 2005 (30 TexReg 7166). The amended section reflects the action of the 79th Texas Legislature in deleting the statutory requirement that the holder of a provisional license be sponsored and directly supervised by a Texas veterinarian. Other minor amendments are adopted to assure full compliance with the Legislative directives.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of §801.151(a) of the Texas Occupations Code which gives the Board authority to adopt rule necessary to administer the Veterinary Licensing Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601040
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: March 19, 2006
Proposal publication date: November 4, 2005
For further information, please call: (512) 305-7555

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CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.64

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.64 concerning Continuing Education Requirements without changes to the proposed text published in the November 4, 2005 *Texas Register* (30 TexReg 7167). The 79th Legislature amended the Veterinary Licensing Act to require stricter standards for verifying continuing education (CE), and authorized the Board to require veterinarians who do not obtain the required number of CE hours to make up those hours in later years. The amendments incorporate those legislative changes into this section by requiring proof of CE hours claimed, and provide for make-up hours. The section is also amended to increase the maximum number of on-line, participatory CE hours that can be claimed from seven to 10 to reflect the number and quality of on-line programs available to veterinarians. The amendments require, however, that at least seven live, on-site hours be obtained each year.

A comment on the proposed rule was received from Harold Emerson, D.V.M., who suggested that 12, instead of 10, of the required CE hours be allowed for on-line study. He noted the large number of excellent on-line CE programs offered by the Veterinary Information Network (VIN), and felt that he learned more from on-line sessions than from live sessions. The Board notes that the hours that can be claimed for on-line CE are being increased from seven to 10. Future increases are possible. However, the Board feels that the benefits of live CE sessions with face-to-face interactions are valuable in the CE process and believes that the proposed allocation of on-line and live CE hours strikes a reasonable balance.

The adopted changes will strengthen verification of CE acquired by veterinarians and encourage them, through the mechanism of

making up missed hours, to obtain the required number of hours each year in a timely manner.

The amendments are adopted under the authority of §801.151(a) of the Texas Occupations Code which give the Board authority to adopt rules necessary to administer the Veterinary Licensing Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601039
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: March 19, 2006
Proposal publication date: November 4, 2005
For further information, please call: (512) 305-7555

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22 TAC §573.66

The Texas Board of Veterinary Medical Examiners adopts amendments to §573.66 concerning Monitoring Licensees' Compliance with Article 8890 with minor typographical changes to the proposed text as published in the *Texas Register* on November 4, 2005 (30 TexReg 7169). The amendments set out changes to the Board's compliance inspection procedures. Until recently, the Board conducted primarily on-site inspections of veterinarians to determine compliance with the Veterinary Licensing Act and Board rules. Because of budgetary cuts that have reduced travel expenditures, the Board is now also conducting inspections by mail, whereby licensees are required to provide copies of medical records, proof of continuing education, and other documents. The amendments clearly inform licensees of the items that must be produced by the inspections and specify sanctions which will apply if noted deficiencies are not addressed. By addressing specific items for inspection, the amendments will encourage better compliance with statutory and regulatory requirements.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of §801.151(a) of the Texas Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing Act.

§573.66. Monitoring Licensee Compliance.

(a) The Board shall conduct a compliance monitoring program to ensure that licensees comply with the requirements of Chapter 801, Texas Occupations Code (the Veterinary Licensing Act) and the Board's rules.

(b) The Board's compliance monitoring program shall include on-site inspections of veterinary practices and inspections by mail.

(1) On-site inspections shall include, but are not limited, to the following items:

(A) display of license and current renewal certificate;

(B) properly posted consumer information;

(C) documentation of continuing education hours;

(D) sanitation;

(E) patient record keeping;

(F) controlled substance record keeping; and

(G) possession of appropriate controlled substance registrations and certificates.

(2) Inspections by mail shall request a veterinarian to provide the following non-exclusive items:

(A) proof of continuing education hours;

(B) copies of controlled substance registrations and certificates;

(C) copies of four medical records concerning the diagnosis and treatment of a patient;

(D) copy of the last page of the veterinarian's controlled substance log book for each controlled substance possessed by the veterinarian; and

(E) a notarized statement verifying that the licensee is in compliance with Board rules concerning consumer information, maintenance of sanitary premises, display of license and degrees, and notification of licensee addresses.

(c) After an on-site inspection, licensees will normally be given 45 days to correct deficiencies and provide written documentation of the corrections. Licensees will normally be given 30 days to respond to an inspection by mail. If no timely response is received within that time period, the inspection process will become an investigation and the Board will follow the formal investigative procedure.

(d) After an initial inspection, if the licensee makes required corrections to noted deficiencies, investigators may recommend to the director of enforcement to close a compliance inspection deficiency to "no violation" within the spirit and intent of the program, except when a deficiency involves flagrant disregard of the law, including illegal practices; improper use of prescription drugs; failure to account for drugs dispensed or administered; failure to comply with controlled substance registration requirements, continuing education requirements, and sanitation; and drug diversion and/or abuse. Where such violations are noted, the compliance inspection shall be terminated and the investigator will open an investigation and the violations will be referred to the director of enforcement for review as a complaint.

(e) When in a subsequent inspection a licensee is found to have failed to correct those deficiencies noted in the prior inspection, the investigator will advise the director of enforcement and the licensee that the licensee has continued to violate the Veterinary Licensing Act and/or Board rules.

(f) The Board may, on an unannounced basis, inspect licensees who have been ordered to perform certain acts as a result of a previous inspection to verify that the licensees performed the required acts. If the licensee is found to have refused or failed to comply with the Board order, the investigator will prepare a report documenting the failure to comply and the report will be submitted to the Board for appropriate disciplinary action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601038
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: March 19, 2006
Proposal publication date: November 4, 2005
For further information, please call: (512) 305-7555

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22 TAC §573.76

The Texas Board of Veterinary Medical Examiners adopts new §573.76 concerning Sterilization of Animals from Releasing Agencies without changes to the proposed text as published in the *Texas Register* on November 4, 2005 (30 TexReg 7170). The new section reflects amendments to the Health & Safety Code passed by the 79th Legislature, which required that sterilized animals released for adoption from animal pounds and shelters be identified by a method authorized by the Board. The new section requires that a sterilized animal be identified by a microchip or tattoo. Requirements for microchips and tattoos are set out in the section. Adoption of this section fulfills the statutory mandate and will assist greatly in identifying for veterinarians and the public animals that have been sterilized.

No comments were received regarding adoption of the new section.

The section is adopted under the authority of §801.151(a) of the Texas Occupations Code which gives the Board authority to adopt rules necessary to administer the Veterinary Licensing Act and protect the public.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 27, 2006.

TRD-200601037
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: March 19, 2006
Proposal publication date: November 4, 2005
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 229. FOOD AND DRUG

SUBCHAPTER K. TEXAS FOOD ESTABLISHMENTS

The Executive Commissioner of the Health and Human Services (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§229.161 - 229.171, and 229.173 - 229.175, and new §§229.161 - 229.171, and 229.173 - 229.175, concerning the regulation of retail food establishments. New §§229.162 - 229.167, 229.169, and 229.171 are adopted with changes to the proposed text as published in the August 26, 2005, issue of the *Texas Register* (30 TexReg 4897). The repeal of §§229.161 - 229.171, and 229.173 - 229.175 and new §§229.161, 229.168, 229.170, and 229.173 - 229.175 are adopted without changes to the proposed text and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The new rules are needed to replace the existing rules and to reflect the current science and knowledge regarding best practices, emerging pathogens and new retail food technologies. The existing rules are based on the 1997 U.S. Food and Drug Administration (FDA's) model Food Code and are outdated. The new rules are consistent with the current FDA model Food Code which may be accessed electronically at http://www.cfsan.fda.gov/dms/foodcode.html.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 229.161 - 229.171, and 229.173 - 229.175 have been reviewed and the department has determined that reasons for adopting these sections continue to exist because rules on the subject are needed to reduce the potential for foodborne illness in Texas consumers. The new rules provide the clarification and updating of the existing §§229.161 - 229.171, and 229.173 - 229.175, as a result of the rules review.

SECTION-BY-SECTION SUMMARY

Adopted new §229.161 states the purpose of the Texas Food Establishment Rules, which is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented. Adopted new §229.162 adds and updates definitions based upon current national food industry practices and input from stakeholders. The amendments to the definitions reflect changes in the food industry's handling of food due to increased knowledge regarding newly identified food-related health risks, technological advances, and changes in consumer taste and preferences. These definitions more clearly define the meaning of mobile food establishments and prohibit roadside vendors from preparing or processing food. In addition, the amended definitions allow a variance to enable regulatory authorities to grant certain approvals after review. Adopted new §229.163 specifies requirements for management and personnel including demonstration of knowledge, duties of the person in charge, reporting and responding to disease or medical conditions, and requirements for handwashing and other hygienic practices. This section has been amended to include Norovirus on the list of illnesses that require reporting and exclusion of infected food employees. Adopted new §229.164 includes requirements for food condition, source, labeling, and processing; time and temperature controls; measures to prevent food contamination; variance requirements for specialized processing methods; criteria for using reduced oxygen packaging for food; consumer advisories for raw or undercooked foods; and requirements for donating foods. Wording in this section has been added to reflect that the temperature required to hot-hold potentially hazardous food has been lowered from 140 degrees Fahrenheit to 135 degrees Fahrenheit. Adopted new §229.165 addresses safety, design, installation, and maintenance for equipment and utensils. Operational requirements for cleaning, sanitizing, and proper handling of utensils and equipment are specified. The section also addresses proper laundering, storage, and use of linens. Adopted new §229.166 includes requirements for providing a safe and adequate water supply and

for proper disposal of both liquid and solid waste. Adopted new §229.167 covers construction and maintenance requirements for the building and premises including handwashing and toilet facilities. Adopted new §229.168 specifies control measures for pests and toxic materials. Adopted new §§229.169 and 229.170 list requirements for mobile food establishments and temporary food establishments, respectively. Adopted new §229.171 contains compliance and enforcement provisions for protecting public health, variance requests, hazard analysis and critical control point (HACCP) plans, permits, inspections, reports, public information, and disease control. This section also contains new language outlining the levels of competency for inspectors, who should meet the basic curriculum and field training requirements in the Food and Drug Administration's National Retail Food Regulatory Program Standards, as an option to being a Registered Sanitarian in Texas. Adopted new §§229.173, 229.174, and 229.175 include requirements for the Heimlich maneuver poster, bed and breakfast extended establishments, and outfitter operations, respectively.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts.

The commenters were individuals, associations, and/or groups, including the following: Texas Restaurant Association; Texas Environmental Health Association; National Restaurant Association; Texas Petroleum Marketers and Convenience Store Association; Harris County Health Department; Luby's, Incorporated; Grayson County Health Department; Tarrant County Health Department; HEB Grocery Company; Waco-McLennan County Public Health District; City of Lubbock Health Department; Ector County Health Department; U.S. Food and Drug Administration; Representative Charlie Geren; and San Antonio Metro Health Department. The commenters were not against the rules in their entirety; however, the commenters suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning the rules in general, one commenter stated that he supported the rules in their entirety.

Response: The commission agrees with the commenter. No change was made as a result of the comment.

Comment: Concerning the rules in general, one commenter suggested that the adoption of the rules be postponed until after the publication of the 2005 model Food Code. The commenter stated that he supported the changes in the rules and that the rules represent improvement, but any other changes in the 2005 model Food Code should be considered and incorporated.

Response: The commission disagrees with the commenter. Most of the changes in the 2005 model Food Code were made due to issues that were discussed and resolved at the 2004 Conference for Food Protection and were included in the new rule. The department will thoroughly review any other changes in the 2005 model Food Code and make recommendations to the commission for an amendment, if appropriate, at a later time. No change was made as a result of the comment.

Comment: Concerning the rules in general, one commenter suggested that only the proposed changes be underlined because the rules were hard to read. The commenter also asked for a listing of the significant differences between the 1998 Texas Food Establishment Rules and the new rules.

Response: The commission disagrees with the commenter. The old rules were repealed and all of the proposed rules are new, not amended. The underlining is a format required by the Texas Register. The department intends to post a document on the department web page after the rules become finalized, which will summarize the major changes between the 1998 rules and the new rules. No change was made as a result of the comment.

Comment: Concerning §229.162, Definitions, one commenter stated that the definition of "HACCP" had been removed from the new rules and that the definition should be added because "HACCP" is referenced several times in the new rules.

Response: The commission agrees with the commenter and has added a definition of "HACCP" that was written by the HACCP Subcommittee of the National Advisory Committee on Microbiological Criteria for Foods. The addition of the definition caused the renumbering of the definitions throughout the section including the graphics in §229.162(74)(D)(i) - (ii) and the renumbering were the only changes to the graphics.

Comment: Concerning §229.162(78), the definition of "pushcart", one commenter suggested that a statement be added that the definition does not apply to non self-propelled units owned and operated within a retail food store.

Response: The commission agrees with the commenter and has added the statement to the definition of "pushcart" in renumbered §229.162(79). The statement should clarify that a pushcart that is used for display, owned and operated within a retail food store should be considered a part of the retail food store.

Comment: Concerning §229.162(79), the definition of "ready-to-eat food", one commenter suggested that a statement should be added to (B)(iv) that would exclude foods that are intended to be reheated at a later time from being a ready-to-eat potentially hazardous food.

Response: The commission disagrees with the commenter. The exclusion is not included in the FDA model Food Code and the department believes the rules should be consistent with the Food Code. No change was made as a result of the comment.

Comment: Concerning §229.162, Definitions, one commenter suggested that a definition of "TCS" should be added because the concept is introduced in the rules without definition.

Response: The commission agrees with the commenter and has added a definition of "TCS" (Time and temperature control for safety) as §229.162(106).

Comment: Concerning §229.162, Definitions, one commenter suggested that a definition of "Food Preparation" should be added.

Response: The commission disagrees with the commenter. The definition is not included in the FDA model Food Code and the department believes the rules should be consistent with the Food Code. No change was made as a result of the comment.

Comment: Concerning §229.162, Definitions, one commenter suggested that a definition of "non-spillable beverage container" should be added.

Response: The commission disagrees with the commenter. The definition is not included in the FDA model Food Code and the department believes the rules should be consistent with the Food Code. No change was made as a result of the comment.

Comment: Concerning §229.163(d)(1)(B)(i)(V), one commenter suggested that "Fever" by itself, as a reportable symptom of gastrointestinal illness, should be removed.

Response: The commission agrees with the commenter and has removed "Fever" by itself. This change is consistent with the 2005 FDA model Food Code. "Fever" by itself is not one of the common symptoms experienced by persons suffering from the pathogens identified by the Center for Disease Control (CDC) as transmissible through food by infected food employees.

Comment: Concerning §229.163(h), one commenter suggested that language should be added to clarify that food employees should wash their hands after handling currency and before handling ready-to-eat food.

Response: The commission disagrees with the commenter. The department believes that this requirement is included with §229.163(h)(9), as an activity that may have contaminated hands. No change was made as a result of the comment.

Comment: Concerning §229.163(m), one commenter suggested that language be added to require that closed-toe shoes be required to be worn by food employees.

Response: The commission disagrees with the commenter. This is an employee safety issue, not a food safety issue. No change was made as a result of the comment.

Comment: Concerning §229.163(m), one commenter suggested that language be added to require that food employees either be prohibited from wearing shorts or wear an apron over the shorts.

Response: The commission disagrees with the commenter. It is dirty clothing, not the type of clothing that can harbor diseases that are transmissible through food. The requirement that food employees wear clean outer clothing, in addition to following proper handwashing procedures is a better preventive measure. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D)(i)(I) one commenter stated that a listing of "ready-to-eat" foods would be difficult to maintain because the menu changes frequently. The manager would have to review the list each day, which will be an additional time burden.

Response: The commission agrees with the commenter. This written requirement has been removed.

Comment: Concerning §229.164(e)(1)(D)(i)(I) one commenter stated that he supported all of the provisions of §229.164(e)(1)(D) except the requirement to maintain a written listing of "ready-to-eat" foods. He stated that if the other provisions are maintained in the rule, the listing should not be needed.

Response: The commission agrees with the commenter. This written requirement has been removed.

Comment: Concerning §229.164(e)(1)(D)(i)(II), one commenter stated that it would be difficult for a diagram to show that a handwash facility is close to every work station because there is often not a designated work station. Food-handling work is done in many different areas of a restaurant.

Response: The commission agrees with the commenter. This written requirement for diagrams has been removed.

Comment: Concerning §229.164(e)(1)(D)(i), one commenter stated that adding lists and diagrams will have no impact on food safety and should be removed.

Response: The commission agrees with the commenter. The requirement for these written procedures has been removed.

Comment: Concerning §229.164(e)(1)(D), one commenter stated that the 1998 Texas Food Establishment Rules adequately address bare-hand contact and the proposed provisions should not be required.

Response: The commission disagrees with the commenter. The department has documented during the last year that approximately 9% of retail food establishments under department jurisdiction have handwashing violations and 6% of retail food establishments have violations of the bare-hand contact provisions. The 2004 FDA Report on the Occurrence of Foodborne Illness Risk Factors provided data that indicated that retail food establishments were not in compliance for proper, adequate handwashing in 31.9% to 72.7% of inspections, depending on the type of establishment. The FDA report indicated that noncompliance for the prevention of hand contamination, which includes the bare-hand contact provisions, was documented in 7.9% to 57.2% of inspections, depending on the type of establishment. The data was collected from a variety of retail food establishments, including institutional establishments and retail food stores. The highest rate of noncompliance for both proper, adequate handwashing and the prevention of hand contamination was observed in full service restaurants, followed by fast food restaurants. The second highest rate of noncompliance for proper, adequate handwashing was observed in the deli department of retail food stores. The adopted requirements are a necessary intervention for the prevention of norovirus transmission and the spread of other harmful bacteria and viruses through the improper handling of ready-to-eat food. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D), two commenters stated that gloves are as susceptible to contamination as the bare-hand and are not a substitute for frequent handwashing. One commenter added that gloves create a false sense of security and can lead to reduced handwashing. Another commenter added that the use of gloves still requires a good handwashing program.

Response: The commission agrees with the last commenter and will retain the existing requirement for employees training in bare-hand contact procedures, which includes proper handwashing procedures. No change was made as a result of the comments.

Comment: Concerning §229.164(e)(1)(D), one commenter stated that she does not support any of the proposed requirements for bare-hand contact and provided language that requires "managed" bare-hand contact to be allowed but minimized.

Response: The commission disagrees with the commenter because the provided language did not give any guidance or have any requirements for managing bare-hand contact. This is adequately addressed in the rules. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D), one commenter stated that the ultimate solution to reducing poor personal hygiene and illnesses caused by dirty hands is an effective

education and training program and has developed such a program.

Response: The commission agrees with the commenter and retains the requirement for employees training in bare-hand contact procedures, which includes proper handwashing procedures. The department is aware of many good training programs that can be used to meet this requirement. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D)(ii), one commenter suggested that there should be an exemption from the training requirement in those cities and counties that require food-handling training for food employees.

Response: The commission disagrees with the commenter that an exemption should be added to the rules. The rules do not specify where the employee obtains the training or who does the training. The local regulatory authority can determine if the food handler training meets the requirements of the rules and whether the food-handler card/certificate meets the criteria for the required documentation. It is anticipated that completion of a local food-handling course which addresses hand washing will meet the requirements for training. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D)(iii), one commenter stated that hand sanitizers should be required prior to bare-hand contact.

Response: The commission agrees with the commenter. The use of a hand sanitizer after hand washing is one of the control methods that can be utilized. No change was made as a result of the comment.

Comment: Concerning §229.164(e)(1)(D), one commenter stated that he would like to have all of the paper work requirements removed from the rules and focus the provisions on employee training. The commenter provided suggested language.

Response: The commission agrees in part with the commenter and has removed the requirements for the listing of ready-to-eat food and the diagrams and written information regarding the handwash facilities. The commission disagrees that the documentation on employee training, the type of utilized control methods, and the documentation of corrective actions should be removed. No changes were made to these clauses.

Comment: Concerning §229.164(h)(4)(E), one commenter suggested that an additional statement be added that would disallow a sanitizing solution that is placed on a working surface to constitute contamination of a food product unless contamination is actually noted.

Response: The commission disagrees with the commenter. The prevention of possible contamination is a valid control measure and actual contamination does not have to be observed. The language as written is consistent with the FDA model Food Code. No changes were made as a result of the comment.

Comment: Concerning §229.164(n)(2), one commenter suggested that a prominent advisory by the juice display could be used instead of the warning labels on the packages of juice.

Response: The commission disagrees with the commenter. The rules state that the warning label must be on the packages of juice, as specified in the 21 Code of Federal Regulations (CFR), §101.17(g), which states that the warning labels must be placed prominently on the containers. No change was made as a result of the comment.

Comment: Concerning §229.164(o)(6)(A), one commenter agreed with the requirement to hot hold potentially hazardous food at 135 degrees Fahrenheit.

Response: The commission agrees with the commenter. No change was made as a result of the comment.

Comment: Concerning §229.164(o)(6)(B)(ii), one commenter suggested that preparation coolers be allowed to hold food at 45 degrees Fahrenheit. The commenter added that the language in this provision should be changed back to the language in the 1998 Texas Food Establishment Rules.

Response: The commission disagrees with the commenter because preparation coolers are types of countertop, under-counter, and open-top refrigeration units. These units are allowed to hold food at 45 degrees Fahrenheit if the units were already in the establishment prior to October 6, 2003, and can remain in the establishment until they can no longer maintain this cold hold temperature. No change was made as a result of the comment.

Comment: Concerning §229.165(k)(12) - (14), one commenter suggested adding a table in the appendix that will list the proper concentration and temperature for commonly used chemical sanitizers and sanitizing temperatures.

Response: The commission disagrees with the commenter because an appendix is not part of the rules and is not published in the *Texas Register*. The department will consider adding a table of the sanitizers to an appendix in the printed rules after the rules become final. No change was made as a result of the comment.

Comment: Concerning §229.165(o)(6)(D)(ii), one commenter suggested that the word "wasted" be changed to "washed".

Response: The commission agrees with the commenter. This typing error has been corrected.

Comment: Concerning §229.166(f)(2), one commenter stated the requirement that a handwashing lavatory be equipped to supply water at 110 degrees Fahrenheit made sense and will effectively reduce microorganisms.

Response: The commission agrees with the commenter. No change was made as a result of the comment.

Comment: Concerning §229.166(h)(1)(A), one commenter suggested that a maximum distance between handwashing sinks and food preparation areas or warewashing areas be added.

Response: The commission disagrees with the commenter. The department believes that there are too many variables to consider for a maximum distance to be established. Also, the FDA model Food Code does not set a maximum distance. The language as written is consistent with the FDA model Food Code. No changes were made as a result of the comment.

Comment: Concerning §229.167(e)(5), one commenter suggested adding "icon" to the list of handwashing signage because there is usually insufficient space for posters or signs and the large signs may interfere with good cleaning practices in these areas.

Response: The commission agrees with the commenter and has added "icon" as an approved type of handwashing signage.

Comment: Concerning §229.169(a)(1), one commenter stated that it would be difficult to enforce the amount of time allowed

for the mobile food establishment to remain at one location and provided suggested language that would prohibit alteration of a vehicle which would reduce mobility.

Response: The commission agrees with the commenter and has removed text concerning the time allowed at one location for a mobile unit and added text to §229.169(a)(1) and new (a)(7) concerning a mobile food establishment be readily moveable.

Comment: Concerning §229.169(a)(8), which was renumbered as §229.169(a)(9), one commenter wanted clarification that roadside vendors were exempt from the water and wastewater requirements because a roadside vendor is not allowed to prepare any food.

Response: The definition of "roadside vendor", §229.162(88), states that food shall not be prepared or processed by a roadside food vendor. The definition supports the exemption from the water and wastewater requirements for a mobile food establishment. No changes were made as a result of the comment.

Comment: Concerning §229.171(i), three commenters suggested that only a Registered Sanitarian be allowed to inspect retail food establishments. One of the commenters added that Sanitarians-in-Training should also be allowed to conduct inspections of retail food establishments.

Response: The commission disagrees with the commenters. The department does not have statutory authority to require that local health agencies employ Registered Sanitarians. The department does strongly encourage the use of Registered Sanitarians in retail food inspections and has included the recommendation in the rules. The commission agrees with part of the suggestion and has added "Sanitarian-in-Training" to the inspector qualification list.

Comment: Concerning §229.171(i), one commenter suggested that only a Registered Sanitarian or Sanitarians in Training be allowed to teach Certified Food Manager classes.

Response: The commission disagrees with the commenter. The requirements for the Accreditation of Certified Food Manager Programs, including the instructor qualification, are not part of these rules. No changes were made as a result of the comment.

Comment: Concerning §229.171(j)(6), one commenter asked whether the inspection form would replace the form in the 1998 Texas Food Establishment Rules. The commenter also stated that his company uses the 1998 inspection form to emphasize their internal food safety program.

Response: The commission disagrees with the commenter. The new form replaces the 1998 form. The new form retains all of the important elements of the old inspection form. Only critical violations of the foodborne illness risk factors are marked, which supports the principles of food safety. No changes were made as a result of the comment.

The department staff, on behalf of the commission, provided comments and the commission has reviewed and agrees to the following changes that will clarify language and add correct references.

Change: Concerning §§229.162, 229.164 - 229.166, the spelling of the word "Celcius" was corrected to "Celsius" throughout the sections.

Change: Concerning renumbered §229.162(89), new language reclassifies a "roadside food vendor" as a "mobile food establishment" in the third sentence of the definition to be consistent with verbiage in the text of §229.169(a)(8).

Change: Concerning §229.164(j)(3)(D), language was added to clarify that unpackaged potentially hazardous food may not be sold in bulk from a self-serve container. The new language will be consistent with the Health and Safety Code, Chapter 438, §438.002.

Change: Concerning §229.164(o)(7)(E), (H), and (I), language was added to clarify the type of cheeses that are exempted from date marking and to include other types of processed food that are exempted from date marking. The language was added after information was received from the FDA and is consistent with the 2005 FDA model Food Code.

Change: Concerning §229.164(u)(5), language was added to clarify that time only, as the public health control, may not be used for raw eggs when serving a highly susceptible population.

Change: Concerning §229.164(u)(7) and (8), language was added to clarify the type of food and conditions under which food may be re-served to a highly susceptible population. The language was added after information was received from the FDA and is consistent with the 2005 FDA model Food Code.

Change: Concerning §229.165(r)(3)(D), the citation of the definition of sanitization was changed to the correct numbering sequence.

Change: Concerning the graphic in §229.171(j)(6), the acronyms for potentially hazardous food (PHF) and time/temperature control for safety (TCS) were defined at the end of the graphic.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the adoption has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

25 TAC §§229.161 - 229.171, 229.173 - 229.175

STATUTORY AUTHORITY

The adopted repeals are authorized by Health and Safety Code, §437.0056, which requires the department to adopt rules for granting and maintaining retail food permits in areas not regulated by counties and public health districts; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 23, 2006.

TRD-200600961

Cathy Campbell
General Counsel
Department of State Health Services
Effective date: March 15, 2006
Proposal publication date: August 26, 2005
For further information, please call: (512) 458-7111 x6972

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25 TAC §§229.161 - 229.171, 229.173 - 229.175

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§229.162. Definitions.

The following definitions apply in the interpretation and application of this Code.

(1) Additive--

(A) Food additive is a substance which affects the characteristics of any food as specified in the Texas Health and Safety Code, Chapter 431, §431.002(17).

(B) Color additive is any material imparting color to a food as stated in the Texas Health and Safety Code, Chapter 431, §431.002(6).

(2) Adulterated food--A food shall be deemed to be adulterated as specified in the Texas Health and Safety Code, Chapter 431, §431.081.

(3) Approved--Acceptable to the regulatory authority based on a determination of conformity with principles, practices, and generally recognized standards that protect public health.

(4) a_w --Water activity which is a measure of the free moisture in a food, is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol a_w.

(5) Bed and Breakfast--

(A) Bed and Breakfast Limited means:

(i) an establishment with seven or fewer rooms for rent;

(ii) an establishment that serves breakfast to overnight guests;

(iii) the establishment is not a retail food establishment; and

(iv) the owner or manager shall successfully complete a food manager's certification course accredited by the department.

(B) Bed and Breakfast Extended means:

(i) an establishment with more than seven rooms for rent; or

(ii) an establishment that provides food service other than breakfast to overnight guests; and

(iii) the establishment must meet the specific requirements as outlined in §229.174 of this title (relating to Bed and Breakfast Extended Establishments).

(C) Bed and Breakfast Food Establishment means:

(i) an establishment that provides food service other than to its overnight guests; and

(ii) the establishment must meet the rules and regulations applicable to retail food establishments.

(6) Beverage--A liquid for drinking, including water.

(7) Bottled drinking water--Water that is sealed in bottles, packages, or other containers and offered for sale for human consumption, including bottled mineral water.

(8) Casing--A tubular container for sausage products made of either natural or artificial (synthetic) material.

(9) Certification number--A unique combination of letters and numbers assigned by a shellfish control authority to a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program.

(10) Child care center--Any facility licensed by the regulatory authority to receive 13 or more children for child care, which prepares food for on-site consumption.

(11) CIP--Cleaned in place by the circulation or flowing by mechanical means through a piping system of a detergent solution, water rinse, and sanitizing solution onto or over equipment surfaces that require cleaning, such as the method used, in part, to clean and sanitize a frozen dessert machine except that CIP does not include the cleaning of equipment such as band saws, slicers, or mixers that are subjected to in-place manual cleaning without the use of a CIP system.

(12) Code of Federal Regulations (CFR)--Citations in these rules to the CFR refer sequentially to the Title, Part, and Section numbers, such as 21 CFR §178.1010 refers to Title 21, Part 178, §1010. The compilation of the general and permanent rules published in the *Federal Register* by the executive departments and agencies of the federal government which:

(A) is published annually by the U.S. Government Printing Office; and

(B) contains FDA rules in 21 CFR, USDA rules in 7 CFR and 9 CFR, EPA rules in 40 CFR, and Wildlife and Fisheries rules in 50 CFR.

(13) Commingle--

(A) To combine shellstock harvested on different days or from different growing areas as identified on the tag or label, or

(B) To combine shucked shellfish from containers with different container codes or different shucking dates.

(14) Comminuted--Reduced in size by methods including chopping, flaking, grinding, or mincing. The term includes fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, gyros, ground beef, and sausage; and a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.

(15) Common dining area--A central location in a group residence where people gather to eat at mealtime. The term does not

apply to a kitchenette or dining area located within a resident's private living quarters.

(16) Confirmed disease outbreak--A foodborne disease outbreak in which laboratory analysis of appropriate specimens identifies a causative agent and epidemiological analysis implicates the food as the source of the illness.

(17) Consumer--A person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.

(18) Corrosion-resistant material--A material that maintains acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, the normal use of cleaning compounds and sanitizing solutions, and other conditions of the use environment.

(19) Critical control point--A point or procedure in a specific food system where loss of control may result in an unacceptable health risk.

(20) Critical item--A provision of these rules, that, if in noncompliance, is more likely than other violations to contribute to food contamination, illness, or environmental health hazard.

(21) Critical limit--The maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.

(22) Department--The Department of State Health Services.

(23) Disclosure--A written statement that clearly identifies the animal-derived foods which are, or can be ordered, raw, undercooked, or without otherwise being processed to eliminate pathogens in their entirety, or items that contain an ingredient that is raw, undercooked, or without otherwise being processed to eliminate pathogens.

(24) Drinking water--

(A) "Drinking water" means water that meets 30 TAC, §§290.101-290.114, 290.117-290.119, 290.121 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

(B) Drinking water is traditionally known as "potable water."

(C) Drinking water includes the term "water" except where the term used connotes that the water is not potable, such as "boiler water," "mop water," "rainwater," "wastewater," and "nondrinking" water.

(25) Dry storage area means a room or area designated for the storage of packaged or containerized bulk food that is not potentially hazardous and dry goods such as single-service items.

(26) Easily cleanable--

(A) Easily cleanable means a characteristic of a surface that:

(i) allows effective removal of soil by normal cleaning methods;

(ii) is dependent on the material, design, construction, and installation of the surface; and

(iii) varies with the likelihood of the surface's role in introducing pathogenic or toxigenic agents or other contaminants into food based on the surface's approved placement, purpose, and use.

(B) Easily cleanable includes a tiered application of the criteria that qualify the surface as easily cleanable as specified under subparagraph (A) of this paragraph to different situations in which varying degrees of cleanability are required such as:

(i) the appropriateness of stainless steel for a food preparation surface as opposed to the lack of need for stainless steel to be used for floors or for tables used for consumer dining; or

(ii) the need for a different degree of cleanability for a utilitarian attachment or accessory in the kitchen as opposed to a decorative attachment or accessory in the consumer dining area.

(27) Easily movable--

(A) Portable; mounted on casters, gliders, or rollers; or provided with a mechanical means to safely tilt a unit of equipment for cleaning; and

(B) Having no utility connection, a utility connection that disconnects quickly, or a flexible utility connection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.

(28) Egg--The shell egg of the domesticated chicken, turkey, duck, goose, or guinea.

(29) Employee--The permit holder, person in charge, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or other person working in a food establishment.

(30) EPA--The U.S. Environmental Protection Agency.

(31) Equipment--

(A) Equipment means an article that is used in the operation of a food establishment such as a freezer, grinder, hood, ice maker, meat block, mixer, oven, reach-in refrigerator, scale, sink, slicer, stove, table, temperature measuring device for ambient air, vending machine, or warewashing machine.

(B) Equipment does not include items used for handling or storing large quantities of packaged foods that are received from a supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks, and skids.

(32) Exclude--To prevent a person from working as a food employee or entering a food establishment except for those areas open to the general public.

(33) Exotic animal--Member of a species of game not indigenous to this state including axis deer, nilga antelope, red sheep, or other cloven-hoofed ruminant animals. Exotic animals are considered livestock as defined in these rules and are amenable to inspection under Texas Health and Safety Code, Chapter 433, §433.035 (Inspection and Other Regulation of Exotic Animals in Interstate Commerce).

(34) FDA--The U.S. Food and Drug Administration.

(35) Fish--

(A) Fish means fresh or saltwater finfish, crustaceans and other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, if such animal life is intended for human consumption.

(B) Fish includes an edible human food product derived in whole or in part from fish, including fish that have been processed in any manner.

(36) Food--A raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(37) Foodborne disease outbreak--The occurrence of two or more cases of a similar illness resulting from the ingestion of a common food.

(38) Food-contact surface--

(A) A surface of equipment or a utensil with which food normally comes into contact; or

(B) A surface of equipment or a utensil from which food may drain, drip, or splash:

(i) into a food; or

(ii) onto a surface normally in contact with food.

(39) Food employee--An individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

(40) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in subparagraph (C)(iv) of this paragraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(41) Food processing plant--

(A) Food processing plant means a commercial operation that manufactures, packages, labels, or stores food for human consumption and does not provide food directly to a consumer.

(B) Food processing plant does not include a food establishment as defined under paragraph (40) of this section.

(42) Game animal--

(A) Game animal means an animal, the products of which are food, that is not classified as cattle, sheep, swine, goat, horse, mule, or other equine in 9 CFR 301, Definitions; as poultry in 9 CFR 381, Poultry Products Inspection Regulations; or as fish as defined under paragraph (35) of this section.

(B) "Game animal" includes mammals such as reindeer, elk, deer, antelope, water buffalo, bison, rabbit, squirrel, opossum, raccoon, nutria, or muskrat, and nonaquatic reptiles such as land snakes.

(C) "Game animal" does not include ratites such as ostrich, emu, and rhea.

(43) General use pesticide--A pesticide that is not classified by EPA for restricted use as specified in 40 CFR §152.175.

(44) Grade A standards--The requirements of the United States Public Health Service/FDA "Grade A Pasteurized Milk Ordinance" with which certain fluid and dry milk and milk products comply.

(45) Group residence--A private or public housing corporation or institutional facility that provides living quarters and meals. The term includes a domicile for unrelated persons such as a retirement home, correctional facility, or a long-term care facility.

(46) Hazard Analysis Critical Control Point (HACCP)--A systematic approach to the hazard identification, evaluation, and control of food safety hazards.

(47) HACCP plan--A written document that delineates the formal procedures for following the Hazard Analysis Critical Control Point principles developed by The National Advisory Committee on Microbiological Criteria for Foods.

(48) Hazard--A biological, chemical, or physical property that may cause an unacceptable consumer health risk.

(49) Hermetically sealed container--A container that is designed and intended to be secure against the entry of microorganisms and, in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.

(50) Highly susceptible population--Persons who are more likely than other people in the general population to experience foodborne disease because they are:

(A) immunocompromised; preschool age children, or older adults; and

(B) obtaining food at a facility that provides services such as custodial care, health care, or assisted living, such as a child or adult day care center, kidney dialysis center, hospital or nursing home, or nutritional or socialization services such as a senior center.

(51) Imminent health hazard--A significant threat or danger to health that is considered to exist when there is evidence suffi-

cient to show that a product, practice, circumstance, or event creates a situation that requires immediate correction or cessation of operation to prevent injury based on:

(A) the number of potential injuries; and

(B) the nature, severity, and duration of the anticipated injury.

(52) Injected--Manipulating a meat so that infectious or toxigenic microorganisms may be introduced from its surface to its interior through tenderizing with deep penetration or injecting the meat such as by processes which may be referred to as "injecting," "pinning," or "stitch pumping."

(53) Juice--When used in the context of food safety, the aqueous liquid expressed or extracted from one or more fruits or vegetables, purées of the edible portions of one or more fruits or vegetables, or any concentrates of such liquid or purée. Juice includes juice as a whole beverage, an ingredient of a beverage and a purée as an ingredient of a beverage.

(54) Kitchenware--Food preparation and storage utensils.

(55) Law--Applicable local, state, and federal statutes, regulations, and ordinances.

(56) Linens--Fabric items such as cloth hampers, cloth napkins, tablecloths, wiping cloths, and work garments including cloth gloves.

(57) Livestock--Cattle, sheep, swine, goats, horses, mules, other equine, poultry, domesticated rabbits, exotic animals, and domesticated birds. Livestock are amenable to inspection.

(58) Meat--The flesh of animals used as food including the dressed flesh of cattle, swine, sheep, or goats and other edible animals, except fish, poultry, exotic animals as specified in §229.164(b)(7)(A)(ii) and (iii), and wild game animals as specified in §229.164(b)(7)(B)(iii) and (iv) of this title (relating to Food) that is offered for human consumption.

(59) mg/L--Milligrams per liter, which is the metric equivalent of parts per million (ppm).

(60) Mobile food establishment--A vehicle mounted food establishment that is readily moveable.

(61) Molluscan shellfish--Any edible species of fresh or frozen oysters, clams, mussels, and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle.

(62) Outfitter operation--Any operation such as trail rides or river raft trips where food is offered to patrons and which operates out of a central preparation location or food establishment.

(63) Packaged--

(A) Packaged means bottled, canned, cartoned, securely bagged, or securely wrapped, whether packaged in a food establishment or a food processing plant.

(B) Packaged does not include a wrapper, carry-out box, or other nondurable container used to containerize food with the purpose of facilitating food protection during service and receipt of the food by the consumer.

(64) Permit--The document issued by the regulatory authority that authorizes a person to operate a food establishment.

(65) Permit holder--The entity that:

(A) is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person; and

(B) possesses a valid permit to operate a food establishment.

(66) Person--An association, a corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

(67) Person in charge--The individual present at a food establishment who is responsible for the operation at the time of inspection.

(68) Personal care items--

(A) Personal care items means items or substances that may be poisonous, toxic, or a source of contamination and are used to maintain or enhance a person's health, hygiene, or appearance.

(B) Personal care items include items such as medicines; first aid supplies; and other items such as cosmetics, and toiletries such as toothpaste and mouthwash.

(69) pH--The symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between 0 and 7 indicate acidity and values between 7 and 14 indicate alkalinity. The value for pure distilled water is 7, which is considered neutral.

(70) Physical facilities--The structure and interior surfaces of a food establishment including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air conditioning system vents.

(71) Plumbing fixture--A receptacle or device that:

(A) is permanently or temporarily connected to the water distribution system of the premises and demands a supply of water from the system; or

(B) discharges used water, waste materials, or sewage directly or indirectly to the drainage system of the premises.

(72) Plumbing system--The water supply and distribution pipes; plumbing fixtures and traps; soil, waste, and vent pipes; sanitary and storm sewers and building drains, including their respective connections, devices, and appurtenances within the premises; and water-treating equipment.

(73) Poisonous or toxic materials--Substances that are not intended for ingestion and are included in four categories:

(A) cleaners and sanitizers, which include cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes, and other chemicals;

(B) pesticides, except sanitizers, which include substances such as insecticides and rodenticides;

(C) substances necessary for the operation and maintenance of the establishment such as nonfood grade lubricants and personal care items that may be deleterious to health; and

(D) substances that are not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints.

(74) Potentially hazardous food--

(A) Potentially hazardous food (PHF) means a food that requires time and temperature control for safety (TCS) to limit pathogen growth or toxin production.

(B) Potentially hazardous food includes:

(i) an animal food (a food of animal origin), including fresh shell eggs, that is raw or heat-treated; a food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic-in-oil mixtures that are not modified in a way that results in mixtures that do not support growth as specified under subparagraph (A) of this paragraph; and

(ii) a food whose pH/a_w interaction is designated as PHF/TCS in one of the tables listed in subparagraph (D) of this paragraph, unless a product assessment or vendor documentation acceptable to the regulatory authority is provided.

(C) Potentially hazardous food does not include:

(i) an air-cooled hard-boiled egg with shell intact, or a shell egg that is not hard-boiled, but has been treated to destroy all viable Salmonellae;

(ii) a food whose pH/a_w interaction is designated as non-PHF/non-TCS in one of the tables in subparagraph (D) of this paragraph;

(iii) a food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of non-refrigerated storage and distribution;

(iv) a food for which a product assessment, including laboratory evidence, demonstrates that time and temperature control for safety is not required and that may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms; or

(v) a food that does not support the growth of microorganisms as specified under subparagraph (A) of this paragraph even though the food may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness.

(D) Potentially hazardous food does not include food that, because of pH, wateractivity (a_w) or the interaction of pH and a_w, is considered non-PHF/non-TCS in Table A or B below. Guidance for using the tables is provided in the document entitled "Using pH, a_w, or the Interaction of pH and a_w to Determine If a Food Requires Time/Temperature Control for Safety (TCS)". Copies of the guidance document may be downloaded from the following website: http://www.dshs.state.tx.us, or may be obtained from the department, 1100 West 49th Street, Austin, Texas 78756-3182.

(i) Table A.

Figure: 25 TAC §229.162(74)(D)(i)

(ii) Table B.

Figure: 25 TAC §229.162(74)(D)(ii)

(75) Poultry--

(A) Poultry means:

(i) any domesticated bird (chickens, turkeys, ducks, geese, or guineas), whether live or dead, as defined in the Health and Safety Code, Chapter 433, §433.003; and

(ii) any migratory waterfowl, game bird, such as pheasant, partridge, quail, grouse, or guinea, or pigeon or squab, whether live or dead, as defined in the Health and Safety Code, Chapter 433, §433.003.

(B) Poultry does not include ratites.

(76) Premises--

(A) The physical facility, its contents, and the contiguous land or property under the control of the permit holder; or

(B) The physical facility, its contents, and the land or property not described under subparagraph (A) of this paragraph if its facilities and contents are under the control of the permit holder and may impact food establishment personnel, facilities, or operations, and a food establishment is only one component of a larger operation such as a health care facility, hotel, motel, school, recreational camp, or prison.

(77) Primal cut--A basic major cut into which carcasses and sides of meat are separated, such as a beef round, pork loin, lamb flank, or veal breast.

(78) Public water system has the meaning stated in 30 Texas Administrative Code (TAC), §§290.101 - 290.121 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Supply Systems).

(79) Pushcart--A non self-propelled mobile food unit limited to serving nonpotentially hazardous food or potentially hazardous foods requiring a limited amount of preparation as authorized by the regulatory authority. A pushcart is classified as a mobile food establishment. A pushcart does not include non self-propelled units owned and operated within a retail food store.

(80) Ready-to-eat food--

(A) Ready-to-eat food means food that:

(i) is in a form that is edible without additional preparation to achieve food safety, as specified under §229.164(k)(1)(A) - (C), 229.164(k)(2), or 229.164(l)(1) - (2) of this title;

(ii) is a raw or partially cooked animal food and the consumer is advised as specified under §229.164(k)(1)(D)(i) and (ii) of this title;

(iii) is prepared in accordance with a variance that is granted as specified under §229.164(k)(1)(D)(i) and (iii) of this title; and

(iv) may receive additional preparation for palatability or aesthetic, epicurean, gastronomic, or culinary purposes.

(B) Ready-to-eat food includes:

(i) raw animal food that is cooked as specified under §§229.164(k)(1) or 229.164(k)(2), or frozen as specified under §229.164(l)(1) - (2) of this title;

(ii) raw fruits and vegetables that are washed as specified under §229.164(f)(6) of this title;

(iii) fruits and vegetables that are cooked for hot holding, as specified under §229.164(k)(3) of this title;

(iv) all potentially hazardous food that is cooked to the temperature and time required for the specific food under §229.164(k) of this title, and cooled as specified in §229.164(o)(4) of this title;

(v) plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells, if naturally present are removed;

(vi) substances derived from plants such as spices, seasonings, and sugar;

(vii) a bakery item such as bread, cakes, pies, fillings, or icing for which further cooking is not required for food safety;

(viii) the following products that are produced in accordance with USDA guidelines and that have received a lethality treatment for pathogens: dry, fermented sausages, such as dry salami or pepperoni; salt-cured meat and poultry products, such as prosciutto ham, country cured ham, and Parma ham; and dried meat and poultry products, such as jerky or beef sticks; and

(ix) foods manufactured according to 21 CFR 113, Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers.

(81) Reduced oxygen packaging--

(A) Reduced oxygen packaging means:

(i) the reduction of the amount of oxygen in a package by removing oxygen; displacing oxygen and replacing it with another gas or combination of gases; or otherwise controlling the oxygen content to a level below that normally found in the surrounding, 21% oxygen atmosphere; and

(ii) a process as specified in subparagraph (A)(i) of this paragraph that involves a food for which Clostridium botulinum is identified as a microbiological hazard in the final packaged form.

(B) Reduced oxygen packaging includes:

(i) vacuum packaging, in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package, such as sous vide;

(ii) modified atmosphere packaging, in which the atmosphere of a package of food is modified so that its composition is different from air but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food. Modified atmosphere packaging includes: reduction in the proportion of oxygen, total replacement of oxygen, or an increase in the proportion of other gases such as carbon dioxide or nitrogen; and

(iii) controlled atmosphere packaging, in which the atmosphere of a package of food is modified so that until the package is opened, its composition is different from air, and continuous control of that atmosphere is maintained, such as by using oxygen scavengers or a combination of total replacement of oxygen, nonrespiring food, and impermeable packaging material.

(82) Refuse--Solid waste not carried by water through the sewage system.

(83) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(84) Reminder--A written statement concerning the health risk of consuming animal foods raw, undercooked, or without otherwise being processed to eliminate pathogens.

(85) Restrict--To limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens; and unwrapped single-service or single-use articles.

(86) Restricted egg--Any check, dirty egg, incubator reject, inedible, leaker, or loss as defined in 9 CFR 590.

(87) Restricted use pesticide--A pesticide product that contains the active ingredients specified in 40 CFR §152.175, Pesticides classified for restricted use, and that is limited to use by or under the direct supervision of a certified applicator.

(88) Risk--The likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

(89) Roadside food vendor--A person who operates a mobile retail food store from a temporary location adjacent to a public road or highway. Food shall not be prepared or processed by a roadside food vendor. A roadside food vendor is classified as a mobile food establishment.

(90) Safe material means:

(A) an article manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of any food;

(B) an additive that is used as specified in Chapter 431 of the Texas Health and Safety Code; or

(C) other materials that are not additives and that are used in conformity with applicable regulations of the Food and Drug Administration.

(91) Sanitization--The application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, is sufficient to yield a reduction of 5 logs, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

(92) Sealed--Free of cracks or other openings that allow the entry or passage of moisture.

(93) Service animal--An animal such as a guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.

(94) Servicing area--An operating base location to which a mobile food establishment or transportation vehicle returns regularly for such things as vehicle and equipment cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food.

(95) Sewage--Liquid waste containing animal or vegetable matter in suspension or solution and may include liquids containing chemicals in solution.

(96) Shellfish control authority--A state, federal, foreign, tribal, or other government entity legally responsible for administering a program that includes certification of molluscan shellfish harvesters and dealers for interstate commerce.

(97) Shellstock--Raw, in-shell molluscan shellfish.

(98) Shiga toxin-producing Escherichia coli--Any E. coli capable of producing Shiga toxins (also called verocytotoxins or "Shiga-like" toxins). This includes, but is not limited to, E. coli reported as serotype O157:H7, O157: NM, and O157:H-.

(99) Shucked shellfish--Molluscan shellfish that have one or both shells removed.

(100) Single-service articles--Tableware, carry-out utensils, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use after which they are intended for discard.

(101) Single-use articles--

(A) Single-use articles means utensils and bulk food containers designed and constructed to be used once and discarded.

(B) Single-use articles include items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bot-

tles, and number 10 cans which do not meet the materials, durability, strength, and cleanability specifications under §§229.165(a), (c), and (d) of this title (relating to Equipment, Utensils, and Linens) for multiuse utensils.

(102) Slacking--The process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -23 degrees Celsius (-10 degrees Fahrenheit) to -4 degrees Celsius (25 degrees Fahrenheit) in preparation for deep-fat frying or to facilitate even heat penetration during the cooking of previously block-frozen food such as spinach.

(103) Smooth--

(A) A food-contact surface having a surface free of pits and inclusions with a cleanability equal to or exceeding that of (100 grit) number 3 stainless steel;

(B) A nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale; and

(C) A floor, wall, or ceiling having an even or level surface with no roughness or projections that render it difficult to clean.

(104) Table-mounted equipment--Equipment that is not portable and is designed to be mounted off the floor on a table, counter, or shelf.

(105) Tableware--Eating, drinking, and serving utensils for table use such as flatware including forks, knives, and spoons; hollowware including bowls, cups, serving dishes, and tumblers; and plates.

(106) TCS--Time and temperature control for safety.

(107) Temperature measuring device--A thermometer, thermocouple, thermistor, or other device that indicates the temperature of food, air, or water.

(108) Temporary food establishment--A food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

(109) USDA--The U.S. Department of Agriculture.

(110) Utensil--A food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single-service, or single-use; gloves used in contact with food; temperature sensing probes of food temperature measuring devices; and probe-type price or identification tags used in contact with food.

(111) Variance--A written document issued by the regulatory authority that authorizes a modification or waiver of one or more requirements of this title if, in the opinion of the regulatory authority, a health hazard or nuisance will not result from the modification or waiver.

(112) Vending machine--A self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by optional manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

(113) Vending machine location--The room, enclosure, space, or area where one or more vending machines are installed and operated and includes the storage areas and areas on the premises that are used to service and maintain the vending machines.

(114) Warewashing--The cleaning and sanitizing of utensils and food-contact surfaces of equipment.

(115) Whole-muscle, intact beef--Whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.

§229.163. Management and Personnel.

(a) Responsibility, assignment. The permit holder shall be the person in charge or shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation.

(b) Knowledge, demonstration. Based on the risks of foodborne illness inherent to the food operation, during inspections and upon request the person in charge shall demonstrate to the regulatory authority knowledge of foodborne disease prevention, application of the Hazard Analysis Critical Control Point principles, and the requirements of these rules. The person in charge shall demonstrate this knowledge by:

(1) complying with these rules by having no critical violations during the current inspection;

(2) being a certified food protection manager who has shown proficiency of required information through passing a department approved examination; or

(3) responding correctly to the inspector's questions as they relate to the specific food operation. The areas of knowledge include:

(A) describing the relationship between the prevention of foodborne disease and the personal hygiene of a food employee;

(B) explaining the responsibility of the person in charge for preventing the transmission of foodborne disease by a food employee who has a disease or medical condition that may cause foodborne disease;

(C) describing the symptoms associated with the diseases that are transmissible through food;

(D) explaining the significance of the relationship between maintaining the time and temperature of potentially hazardous food and the prevention of foodborne illness;

(E) explaining the hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish;

(F) stating the required food temperatures and times for safe cooking of potentially hazardous food including meat, poultry, eggs, and fish;

(G) stating the required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of potentially hazardous food;

(H) describing the relationship between the prevention of foodborne illness and the management and control of the following:

(i) cross contamination;

(ii) hand contact with ready-to-eat foods;

(iii) handwashing; and

(iv) maintaining the food establishment in a clean condition and in good repair;

(I) explaining the relationship between food safety and providing equipment that is:

(i) sufficient in number and capacity; and

(ii) properly designed, constructed, located, installed, operated, maintained, and cleaned;

(J) explaining correct procedures for cleaning and sanitizing utensils and food-contact surfaces of equipment;

(K) identifying the source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross connections;

(L) identifying poisonous and toxic materials in the food establishment and the procedures necessary to ensure that they are safely stored, dispensed, used, and disposed of according to law;

(M) identifying critical control points in the operation from purchasing through sale or service that when not controlled may contribute to the transmission of foodborne illness and explaining steps taken to ensure that the points are controlled in accordance with the requirements of these rules;

(N) explaining the details of how the person in charge and food employees comply with the HACCP plan if a plan is required by the law, these rules, or an agreement between the regulatory authority and the establishment; and

(O) explaining the responsibilities, rights, and authorities assigned by these rules to the:

(i) food employee;

(ii) person in charge; and

(iii) regulatory authority.

(c) Duties, person in charge. The person in charge shall ensure that:

(1) food establishment operations are not conducted in a private home or in a room used as living or sleeping quarters as specified under §229.167(d)(10) of this title (relating to Physical Facilities);

(2) persons unnecessary to the food establishment operation are not allowed in the food preparation, food storage, or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps are taken to ensure that exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles are protected from contamination;

(3) employees and other persons such as delivery and maintenance persons and pesticide applicators entering the food preparation, food storage, and warewashing areas comply with these rules;

(4) employees are effectively cleaning their hands, by routinely monitoring the employees' handwashing;

(5) employees are visibly observing foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated, and accurately presented, by routinely monitoring the employees' observations and periodically evaluating foods upon their receipt;

(6) employees are properly cooking potentially hazardous food, being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats, through daily oversight of the employees' routine monitoring of the cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated as specified under §229.165(e) and (l)(1)(B) of this title (relating to Equipment, Utensils, and Linens);

(7) employees are using proper methods to rapidly cool potentially hazardous foods that are not held hot or are not for consumption within four hours, through daily oversight of the employees' routine monitoring of food temperatures during cooling;

(8) consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed as specified under §229.164(s) of this title (relating to Food) that the food is not cooked sufficiently to ensure its safety;

(9) employees are properly sanitizing cleaned multiuse equipment and utensils before they are reused, through routine monitoring of solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature, and exposure time for chemical sanitizing;

(10) consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets as specified under §229.164(h)(6) of this title;

(11) except when otherwise approved as specified in §229.164(e)(1)(D) of this title, employees are preventing cross-contamination of ready-to-eat food with bare hands by properly using suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment; and

(12) employees are properly trained in food safety as it relates to their assigned duties.

(d) Disease or medical condition.

(1) Responsibility of the person in charge to require reporting by food employees and applicants. The permit holder shall require food employee applicants to whom a conditional offer of employment is made and food employees to report to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food. A food employee or applicant shall report the information in a manner that allows the person in charge to reduce the risk of foodborne disease transmission, including the date of onset of jaundice or of an illness specified under subparagraph (C) of this paragraph, if the food employee or applicant:

(A) is diagnosed with an illness due to:

(i) Norovirus;

(ii) hepatitis A virus;

(iii) Salmonella typhi;

(iv) Shigella spp.; or

(v) shiga toxin-producing Escherichia coli;

(B) has a symptom caused by illness, infection, or other source that is:

(i) associated with an acute gastrointestinal illness such as:

(I) vomiting;

(II) diarrhea;

(III) jaundice; or

(IV) sore throat with fever.

(ii) a lesion containing pus such as a boil or infected wound that is open or draining and is:

(I) on the hands or wrists, unless an impermeable cover such as a finger cot or stall protects the lesion and a single-use glove is worn over the impermeable cover;

(II) on exposed portions of the arms, unless the lesion is protected by an impermeable cover; or

(III) on other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage;

(C) has experienced jaundice, or a past illness from:

(i) S. typhi within the past three months;

(ii) Shigella spp. or shiga toxin-producing Escherichia coli within the past month; or

(iii) onset of jaundice within the past seven days; or

(D) meets one or more of the following conditions:

(i) is suspected of causing, or being exposed to, a confirmed disease outbreak caused by Norovirus, S. typhi, Shigella spp., shiga toxin-producing Escherichia coli, or hepatitis A virus including an outbreak at an event such as a family meal, church supper, or festival because the food employee or applicant:

(I) prepared food implicated in the outbreak; or

(II) consumed implicated food or food at the event prepared by a person who is infected or ill with the infectious agent that caused the outbreak or who is suspected of being a shedder of the infectious agent;

(ii) lives in the same household as, and has knowledge about, a person who is diagnosed with a disease caused by Norovirus, S. typhi, Shigella spp, shiga toxin-producing Escherichia coli, or hepatitis A virus; or

(iii) lives in the same household as, and has knowledge about, a person who attends or works in a setting where there is a confirmed disease outbreak caused by Norovirus, S. typhi, Shigella spp., shiga toxin-producing Escherichia coli, or hepatitis A virus.

(2) Exclusions and restrictions. The person in charge shall:

(A) exclude a food employee from a food establishment if the food employee is exhibiting sudden onset vomiting and/or diarrhea that cannot be attributed to a non-infectious condition;

(B) exclude a food employee from a food establishment if the food employee is diagnosed with an infectious agent specified under paragraph (1)(A) of this subsection;

(C) exclude jaundiced food employees from the food establishment if the onset of jaundice occurred within the last seven calendar days;

(D) exclude a food employee who is serving a highly susceptible population, if the food employee:

(i) is not experiencing a symptom of acute gastrointestinal illness specified under paragraph (1)(B)(i) of this subsection but has a stool that is positive for Norovirus, S. typhi, Shigella spp., or shiga toxin-producing Escherichia coli;

(ii) had a past illness from S. typhi within the last three months, unless the employee provides laboratory confirmation of three consecutive, negative stools as specified in §229.171(o)(4)(A) of this title (relating to Compliance and Enforcement), and is asymptomatic; or

(iii) had a past illness from Shigella spp. or shiga toxin-producing Escherichia coli within the last month, unless the employee provides laboratory confirmation of two consecutive, negative stools as specified in §229.171(o)(4)(C) of this title, and is asymptomatic; and

(E) except as specified under subparagraph (D) of this paragraph, restrict a food employee from working with exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles, in a food establishment if the food employee is:

(i) suffering from a symptom of a sore throat with fever as specified under paragraph (1)(B)(i)(IV) of this subsection; or

(ii) not experiencing a symptom of acute gastroenteritis specified under paragraph (1)(B)(i) of this subsection but has a stool that yields a specimen culture that is positive for Norovirus, Salmonella typhi, Shigella spp., or shiga toxin-producing Escherichia coli; or

(iii) has a lesion containing pus such as a boil or infected wound that is open or draining as specified under paragraph (1)(B)(ii) of this subsection, and is not covered with an impermeable cover.

(3) Removal of exclusions and restrictions.

(A) The person in charge may remove an exclusion specified under paragraph (2)(A) of this subsection if:

(i) the employee is free of vomiting and/or diarrhea symptoms for at least 24 hours; or

(ii) the person excluded as specified under paragraph (2)(A) of this subsection provides to the person in charge written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, that specifies the vomiting and/or diarrhea result from a chronic noninfectious condition such as Crohn's disease, irritable bowel syndrome, or ulcerative colitis; or other acute noninfectious condition.

(B) The person in charge may remove an exclusion specified under paragraph (2)(B) of this subsection if:

(i) the person in charge obtains approval from the regulatory authority; and

(ii) the person excluded as specified under paragraph (2)(B) of this subsection provides to the person in charge written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, that specifies that the excluded person may work as a food employee in a food establishment, including an establishment that serves a highly susceptible population, because the person is free of the infectious agent of concern as specified in §229.171(o)(4) of this title.

(C) The person in charge may remove a restriction specified under:

(i) paragraph (2)(E)(i) or (iii) of this subsection if the restricted person:

(I) is free of sore throat with fever as specified under paragraph (1)(B)(i)(IV) of this subsection or an infected wound or boil, as specified under paragraph (1)(B)(ii) of this subsection, and no foodborne illness occurs that may have been caused by the restricted person;

(II) is suspected of causing foodborne illness but is free of the symptoms specified under paragraph (1)(B)(i) or (ii) of this subsection and provides written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, stating that the restricted person is free of the infectious agent that is suspected of causing the person's symptoms or causing foodborne illness, as specified in §229.171(o)(4) of this title; or

(III) provides written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, stating that the symptoms experienced result from a chronic noninfectious condition such as Crohn's disease, irritable bowel syndrome, or ulcerative colitis; or

(ii) paragraph (2)(E)(ii) of this subsection if the restricted person provides written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, according to the criteria specified in §229.171(o)(4) of this title that indicates the stools are free of Norovirus, Salmonella typhi, or Shigella spp., or shiga toxin-producing Escherichia coli, whichever is the infectious agent of concern.

(D) The person in charge may remove an exclusion specified under paragraph (2)(D) of this subsection if the excluded person provides written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant:

(i) that specifies that the person is free of the infectious agent of concern as specified in §229.171(o)(4) of this title; or

(ii) if the person is excluded under paragraph (2)(A) of this subsection stating that the symptoms experienced result from a chronic noninfectious condition such as Crohn's disease, irritable bowel syndrome, or ulcerative colitis.

(E) The person in charge may remove a jaundiced employee from an exclusion as specified under paragraph (2)(C) of this subsection, if:

(i) earlier than seven days, no foodborne illness occurs that may have been caused by the excluded or restricted person and the excluded food employee provides written medical documentation from a physician licensed to practice medicine or, if allowed by law, a nurse practitioner or physician assistant, that specifies that the person is free of hepatitis A virus and the excluded food employee is no longer infectious, as specified in §229.171(o)(4)(D)(i) of this title; or

(ii) the excluded or restricted person is suspected of causing foodborne illness and complies with the requirements in §229.171(o)(4)(D)(i) and (ii) of this title.

(4) Responsibility of a food employee or an applicant to report to the person in charge. A food employee or a person who applies for a job as a food employee shall:

(A) in a manner specified under paragraph (1) of this subsection, report to the person in charge the information specified under paragraph (1)(A) - (D) of this subsection; and

(B) comply with exclusions and restrictions that are specified under paragraph (2)(A) - (E) of this subsection.

(5) Reporting by the person in charge. The person in charge shall notify the regulatory authority that a food employee is diagnosed with an illness due to Norovirus, Salmonella typhi, Shigella spp., shiga toxin-producing Escherichia coli, or hepatitis A virus.

(e) Hands and arms, clean condition. Food employees shall keep their hands and exposed portions of their arms clean.

(f) Hands and arms cleaning procedure.

(1) Except as specified in paragraph (2) of this subsection, food employees shall clean their hands and exposed portions of their arms (or surrogate prosthetic devices for hands or arms) for at least 20 seconds, using a cleaning compound in a lavatory that is equipped as specified under §229.166(f)(2) of this title (relating to Water, Plumbing, and Waste).

(2) Food employees shall use the following cleaning procedure:

(A) vigorous friction on the surfaces of the lathered fingers, finger tips, areas between the fingers, hands and arms (or by vigorously rubbing the surrogate prosthetic devices for hands or arms) for at least 10 to 15 seconds, followed by;

(B) thorough rinsing under clean, running warm water; and

(C) immediately follow the cleaning procedure with thorough drying of cleaned hands and arms (or surrogate prosthetic devices) using a method as specified under §229.167(e)(3) of this title (relating to Physical Facilities).

(3) Food employees shall pay particular attention to the areas underneath the fingernails during the cleaning procedure.

(4) If approved and capable of removing the types of soils encountered in the food operations involved, an automatic handwashing facility may be used by food employees to clean their hands.

(g) Special handwash procedures. Employees not utilizing suitable utensils or single-use gloves when handling ready-to-eat foods shall wash hands using the cleaning procedures specified in subsection (f)(2) of this section and follow the approved procedures specified in §229.164(e)(1)(D) of this title.

(h) When to wash. Food employees shall clean their hands and exposed portions of their arms as specified under subsection (f) of this section immediately before engaging in food preparation including working with exposed food, clean equipment and utensils, and unwrapped single-service and single-use articles and:

(1) after touching bare human body parts other than clean hands and clean, exposed portions of arms;

(2) after using the toilet room;

(3) after caring for or handling service animals or aquatic animals as specified in subsection (q)(2) of this section;

(4) except as specified in subsection (n)(2) of this section, after coughing, sneezing, using a handkerchief or disposable tissue, using tobacco, eating, or drinking;

(5) after handling soiled equipment or utensils;

(6) during food preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks;

(7) when switching between working with raw food and working with ready-to-eat food;

(8) before donning gloves for working with food; and

(9) after engaging in other activities that contaminate the hands.

(i) Where to wash. Food employees shall clean their hands in a handwashing lavatory or approved automatic handwashing facility and may not clean their hands in a sink used for food preparation or warewashing, or in a service sink or a curbed cleaning facility used for the disposal of mop water and similar liquid waste.

(j) Hand sanitizers.

(1) A hand sanitizer and a chemical hand sanitizing solution used as a hand dip shall:

(A) comply with one of the following:

(i) be an approved drug that is listed in the FDA publication Approved Drug Products with Therapeutic Equivalence Evaluations as an approved drug based on safety and effectiveness; or

(ii) have active antimicrobial ingredients that are listed in the FDA monograph for over-the-counter (OTC) Health-Care Antiseptic Drug Products as an antiseptic handwash; and

(B) consist of components that are:

(i) listed for such use in contact with food in 21 CFR 178, Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers; or

(ii) exempt from regulation as food additives under 21 CFR §170.39, Threshold of Regulation for Substances Used in Food-contact Articles; or

(iii) generally recognized as safe (GRAS) for the intended use in contact with food within the meaning of the Federal Food, Drug and Cosmetic Act (FFDCA); or

(iv) permitted for such use by an effective Food Contact Substance Notification as defined by paragraph 409(h) of the FFDCA and listed in FDA's Inventory of Effective Premarket Notifications for Food Contact Substances; and

(C) be applied only to hands that are cleaned as specified under subsection (f) of this section.

(2) If a hand sanitizer or a chemical hand sanitizing solution used as a hand dip does not meet the criteria specified under paragraph (1)(B) of this subsection, use shall be:

(A) followed by thorough hand rinsing in clean water before hand contact with food or by the use of gloves; or

(B) limited to situations that involve no direct contact with food by the bare hands.

(3) A chemical hand sanitizing solution used as a hand dip shall be maintained clean and at a strength equivalent to at least 100 mg/L chlorine.

(k) Fingernail maintenance.

(1) Food employees shall keep their fingernails trimmed, filed, and maintained so the edges and surfaces are cleanable and not rough.

(2) Unless wearing intact gloves in good repair, a food employee may not wear fingernail polish or artificial fingernails when working with exposed food.

(l) Jewelry prohibition. While preparing food, food employees may not wear jewelry including medical information jewelry on their arms and hands. This section does not apply to a plain ring such as a wedding band.

(m) Outer clothing clean condition. Food employees shall wear clean outer clothing to prevent contamination of food, equipment, utensils, linens, and single-service and single-use articles.

(n) Eating, drinking, or using tobacco.

(1) Except as specified in paragraph (2) of this subsection, an employee shall eat, drink, or use any form of tobacco only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection cannot result.

(2) A food employee may drink from a closed beverage container if the container is handled to prevent contamination of:

(A) the employee's hands;

(B) the container; and

(C) exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(o) Discharges from the eyes, nose, and mouth. Food employees experiencing persistent sneezing, coughing, or a runny nose that causes discharges from the eyes, nose, or mouth may not work with exposed food; clean equipment, utensils, and linens; or unwrapped single-service or single-use articles.

(p) Hair restraints, effectiveness.

(1) Except as provided in paragraph (2) of this subsection, food employees shall wear hair restraints such as hats, hair coverings or nets, beard restraints, and clothing that covers body hair, that are designed and worn to effectively keep their hair from contacting exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(2) This section does not apply to food employees such as counter staff who only serve beverages and wrapped or packaged foods, hostesses, and wait staff if they present a minimal risk of contaminating exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(q) Handling prohibition.

(1) Except as specified in paragraph (2) of this subsection, food employees may not care for or handle animals that may be present such as patrol dogs, service animals, or pets that are allowed as specified in §229.167(p)(15)(B)(ii) - (v) of this title (relating to Physical Facilities).

(2) Food employees with assistance animals may handle or care for their assistance animals and food employees may handle or care for fish in aquariums or molluscan shellfish or crustacea in display tanks if they wash their hands as specified under subsections (f) and (h)(3) of this section.

§229.164. Food.

(a) Condition safe, unadulterated, and honestly presented. Food shall be safe, unadulterated, and, as specified under subsection (q)(2) of this section, honestly presented.

(b) Approved sources.

(1) Compliance with food law.

(A) Food shall be obtained from sources that comply with applicable laws and are licensed by the state regulatory authority having jurisdiction over the processing and distribution of the food.

(B) Food prepared in a private home, except as allowed in these rules, or from an unlicensed food manufacturer or wholesaler, is considered to be from an unapproved source and may not be used or offered for human consumption in a food establishment.

(C) Packaged food shall be labeled as specified in law, including 21 CFR 101, Food Labeling, 9 CFR 317, Labeling, Marking Devices, and Containers, and 9 CFR 381 Subpart N, Labeling and Containers, and as specified under subsection (c)(7) and (8) of this section.

(D) Fish, other than molluscan shellfish, that are intended for consumption in their raw form and allowed as specified under subsection (k)(1)(D) of this section may be offered for sale or service if they are obtained from a supplier that freezes the fish as specified under subsection (l)(1) of this section; or frozen on the premises as specified under subsection (l)(1) of this section and records are retained as specified under subsection (l)(3) of this section.

(E) Whole-muscle, intact beef steaks that are intended for consumption in an undercooked form without a consumer advisory as specified in subsection (k)(1)(C) of this section shall be:

(i) obtained from a food processing plant that, upon request by the purchaser, packages the steaks and labels them, to indicate that the steaks meet the definition of whole-muscle, intact beef; or

(ii) deemed acceptable by the regulatory authority based on other evidence, such as written buyer specifications or invoices, that indicates that the steaks meet the definition of whole-muscle, intact beef; and

(iii) if individually cut in a food establishment:

(I) cut from whole-muscle intact beef that is labeled by a food processing plant as specified in clause (i) or identified as specified in clause (ii) of this subparagraph;

(II) prepared so they remain intact; and

(III) if packaged for undercooking in a food establishment, labeled as specified in clause (i) or identified as specified in clause (ii) of this subparagraph.

(F) Meat and poultry that is not a ready-to-eat food and is in a packaged form when it is offered for sale or otherwise offered for consumption, shall be labeled to include safe handling instructions as specified in law, including 9 CFR §317.2(l) and 9 CFR §381.125(b).

(G) Shell eggs that have not been specifically treated to destroy all viable Salmonellae shall be labeled to include safe handling instructions as specified in law, including 21 CFR §101.17(h).

(2) Food in a hermetically sealed container. Food in a hermetically sealed container shall be obtained from a food processing plant that is regulated by the food regulatory agency that has jurisdiction over the plant.

(3) Fluid milk and milk products. Fluid milk and milk products shall be obtained from sources that comply with Grade A standards as specified in law.

(4) Fish.

(A) Fish that are received for sale or service shall be:

(i) commercially and legally caught or harvested; or

(ii) approved for sale or service.

(B) Molluscan shellfish that are recreationally caught may not be received for sale or service.

(5) Molluscan shellfish.

(A) Molluscan shellfish shall be obtained from sources according to law and the requirements specified in the U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish.

(B) Molluscan shellfish received in interstate commerce shall be from sources that are listed in the Interstate Certified Shellfish Shippers List.

(6) Wild mushrooms.

(A) Except as specified in subparagraph (B) of this paragraph, mushroom species picked in the wild shall be obtained from sources where each mushroom is individually inspected and found to be safe by an approved mushroom identification expert.

(B) This section does not apply to:

(i) cultivated wild mushroom species that are grown, harvested, and processed in an operation that is regulated by the food regulatory agency that has jurisdiction over the operation; or

(ii) wild mushroom species if they are in packaged form and are the product of a food processing plant that is regulated by the food regulatory agency that has jurisdiction over the plant.

(7) Exotic animals and game animals.

(A) If exotic animals are received for sale or service, they shall:

(i) be commercially raised for food and:

(I) slaughtered, processed, and deemed to be "inspected and approved" under an inspection program administered by USDA in accordance with 9 CFR 352, Exotic Animals; Voluntary Inspection; or

(II) slaughtered, processed, and deemed to be "inspected and passed" under a meat and poultry inspection program administered by the department or any other state meat inspection program deemed equal to USDA inspection;

(ii) as allowed by law, for exotic animals that are live caught, be slaughtered and processed as required in subparagraph (A)(i)(I) or (II) of this paragraph; and

(iii) as allowed by law, for exotic animals that are field dressed:

(I) receive an antemortem and postmortem examination by the appropriate inspection personnel as described in subparagraph (A)(i)(I) or (II) of this paragraph; and

(II) be field dressed, transported, and processed according to the requirements specified by the appropriate regulatory authority as described in paragraph (7)(A)(i)(I) or (II) of this subsection.

(B) If game animals are received for sale or service they shall be:

(i) commercially raised for food and:

(I) raised, slaughtered, and processed under a voluntary inspection program that is conducted by the agency that has animal health jurisdiction; or

(II) under a routine inspection program conducted by a regulatory agency other than the agency that has animal health jurisdiction; and

(III) raised, slaughtered, and processed according to:

(-a-) laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and

(-b-) requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee;

(ii) under a voluntary inspection program administered by the USDA for game animals such as exotic animals (reindeer, elk, deer, antelope, water buffalo, or bison) that are "inspected and approved" in accordance with 9 CFR 352, Exotic Animals; Voluntary Inspection or rabbits that are "inspected and certified" in accordance with 9 CFR 354, Voluntary Inspection of Rabbits and Edible Products Thereof;

(iii) as allowed by law, for wild game animals that are live-caught:

(I) under a routine inspection program conducted by a regulatory agency such as the agency that has animal health jurisdiction; and

(II) slaughtered and processed according to:

(-a-) laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and

(-b-) requirements which are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee; or

(iv) as allowed by law, for field-dressed wild game animals under a routine inspection program that ensures the animals:

(I) receive a postmortem examination by an approved veterinarian or veterinarian's designee; or

(II) are field-dressed and transported according to requirements specified by the agency that has animal health jurisdiction and the agency that conducts the inspection program; and

(III) are processed according to laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program.

(C) A game animal may not be received for sale or service if it is a species of wildlife that is listed in 50 CFR 17, Endangered and Threatened Wildlife and Plants.

(c) Specifications for receiving.

(1) Temperature.

(A) Except as specified in subparagraph (B) of this paragraph, refrigerated, potentially hazardous food shall be at a temperature of 5 degrees Celsius (41 degrees Fahrenheit) or below when received.

(B) If a temperature other than 5 degrees Celsius (41 degrees Fahrenheit) for a potentially hazardous food is specified in law governing its distribution, such as laws governing milk and molluscan shellfish, the food may be received at the specified temperature.

(C) Raw shell eggs shall be received in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.

(D) Potentially hazardous food that is cooked to a temperature and for a time specified under subsection (k) of this section and received hot shall be at a temperature of 57 degrees Celsius (135 degrees Fahrenheit) or above.

(E) A food that is labeled frozen and shipped frozen by a food processing plant shall be received frozen.

(F) Upon receipt, potentially hazardous food shall be free of evidence of previous temperature abuse.

(2) Additives. Food may not contain unapproved food additives or additives that exceed amounts specified in 21 CFR 170 - 180 relating to food additives, generally recognized as safe or prior sanctioned substances that exceed amounts specified in 21 CFR 181 - 186, substances that exceed amounts specified in 9 CFR Subpart C, §424.21(b), food ingredients and sources of radiation, or pesticide residues that exceed provisions specified in 40 CFR 180, Tolerances and Exemptions From Tolerances for Pesticide Chemicals in Food.

(3) Shell eggs. Shell eggs shall be received clean and sound and may not exceed the restricted egg tolerances for U.S. Consumer Grade B as specified in 7 CFR 56, Voluntary Grading of Shell Eggs and United States Standards, Grades, and Weight Classes for Shell Eggs, and 9 CFR 590, Inspection of Eggs and Egg Products.

(4) Eggs and milk products, pasteurized.

(A) Liquid, frozen, and dry eggs and egg products shall be obtained pasteurized.

(B) Fluid and dry milk and milk products complying with grade A standards as specified in law shall be obtained pasteurized.

(C) Frozen milk products, such as ice cream, shall be obtained pasteurized in accordance with the Texas Frozen Desserts Manufacturing Act, Texas Health and Safety Code, Chapter 440.

(D) Cheese shall be obtained pasteurized unless alternative procedures to pasteurization are specified in the CFR, such as 21 CFR 133, Cheeses and Related Cheese Products, for curing certain cheese varieties.

(5) Package integrity. Food packages shall be in good condition and protect the integrity of the contents so that the food is not exposed to adulteration or potential contaminants.

(6) Ice. Ice for use as a food or a cooling medium shall be made from drinking water.

(7) Shucked shellfish, packaging and identification.

(A) Raw shucked shellfish shall be obtained in nonreturnable packages which bear a legible label that identifies the:

(i) name, address, and certification number of the shucker-packer or repacker of the molluscan shellfish; and

(ii) the "sell by" date for packages with a capacity of less than 1.87 L (one-half gallon) or the date shucked for packages with a capacity of 1.87 L (one-half gallon) or more.

(B) A package of raw shucked shellfish that does not bear a label or which bears a label which does not contain all the information as specified under subparagraph (A) of this paragraph shall be subject to detention as provided in Health and Safety Code, Chapter 436.

(8) Shellstock identification.

(A) Shellstock shall be obtained in containers bearing legible source identification tags or labels that are affixed by the harvester and each dealer that depurates, ships, or reships the shellstock, as specified in the Texas Molluscan Shellfish Rules, 25 TAC, Chapter 241, §§241.50 - 241.71, and that list:

(i) except as specified under subparagraph (C) of this paragraph, on the harvester's tag or label, the following information in the following order:

(I) the harvester's identification number that is assigned by the shellfish control authority;

(II) the date of harvesting;

(III) the most precise identification of the harvest location or aquaculture site that is practicable based on the system of harvest area designations that is in use by the shellfish control authority and including the abbreviation of the name of the state or country in which the shellfish are harvested;

(IV) the type and quantity of shellfish; and

(V) the following statement in bold, capitalized type: "THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CON-

TAINER IS EMPTY OR RETAGGED AND THEREAFTER KEPT ON FILE FOR 90 DAYS"; and

(ii) except as specified in subparagraph (D) of this paragraph, on each dealer's tag or label, the following information in the following order:

(I) the dealer's name and address, and the certification number assigned by the shellfish control authority;

(II) the original shipper's certification number including the abbreviation of the name of the state or country in which the shellfish are harvested;

(III) the same information as specified for a harvester's tag under clause (i)(II) - (IV) of this subparagraph;

(IV) the following statement in bold, capitalized type: "THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY AND THEREAFTER KEPT ON FILE FOR 90 DAYS"; and

(V) the consumer information statement required as specified in subsection (s) of this section.

(B) A container of shellstock that does not bear a tag or label or that bears a tag or label that does not contain all the information as specified under subparagraph (A) of this paragraph shall be subject to detention as provided in Health and Safety Code, Chapter 436.

(C) If a place is provided on the harvester's tag or label for a dealer's name, address, and certification number, the dealer's information shall be listed first.

(D) If the harvester's tag or label is designed to accommodate each dealer's identification as specified under subparagraph (A)(ii)(I) and (II) of this paragraph, individual dealer tags or labels need not be provided.

(9) Shellstock, condition. When received by a food establishment, shellstock shall be reasonably free of mud, dead shellfish, and shellfish with broken shells. Dead shellfish or shellstock with badly broken shells shall be discarded.

(10) Juice treated. Pre-packaged juice shall:

(A) be obtained from a processor with a HACCP system as specified in 21 CFR 120;

(B) be obtained pasteurized or otherwise treated to attain a 5-log reduction of the most resistant microorganism of public health significance as specified in 21 CFR §120.24; or

(C) bear a warning label as specified in 21 CFR §101.17(g).

(d) Molluscan shellfish, maintaining identification.

(1) Except as specified in paragraphs (2) - (4) of this subsection, molluscan shellfish may not be removed from the container in which they are received other than immediately before sale or preparation for service.

(2) For display purposes, shellstock may be removed from the container in which they are received, displayed on drained ice, or held in a display container maintained at 41 degrees Fahrenheit, and a quantity specified by a consumer may be removed from the display or display container and provided to the consumer if:

(A) the source of the shellstock on display is identified as specified under subsection (c)(8) of this section and recorded as specified under paragraph (5) of this subsection; and

(B) the shellstock are protected from contamination.

(3) Shucked shellfish may be removed from the container in which they were received and held in a display container maintained at or below 41 degrees Fahrenheit from which individual servings are dispensed upon a consumer's request if:

(A) the labeling information for the shellfish on display as specified under subsection (c)(7) of this section is retained and correlated to the date when, or dates during which, the shellfish are sold or served; and

(B) the shellfish are protected from contamination.

(4) Shucked shellfish may be removed from the container in which they were received and repacked in consumer self service containers where allowed by law if:

(A) the labeling information for the shellfish is on each container as specified under subsection (c)(7) of this section and subsection (r) of this section; and

(B) the labeling information as specified under subsection (c)(7) of this section is retained which correlates with the date when, or dates during which, the shellfish are sold or served;

(C) is maintained for 90 days; and

(D) the shellfish are protected from contamination.

(5) Shellstock, tags.

(A) Except as specified under subparagraph (B)(ii) of this paragraph, shellstock tags shall remain attached to the container in which the shellstock are received until the container is empty.

(B) The identity of the source of shellstock that are sold or served shall be maintained by retaining shellstock tags or labels for 90 calendar days from the date the container is emptied by:

(i) using an approved record keeping system that keeps the tags or labels in chronological order correlated to the date when, or dates during which, the shellstock are sold or served; and

(ii) if shellstock are removed from their tagged or labeled container:

(I) preserving source identification by using a record keeping system as specified under clause (i) of this subparagraph; and

(II) ensuring that shellstock from one tagged or labeled container are not commingled with shellstock from another container with different shellfish certification numbers, different harvest dates or different growing areas as identified on the tag or label.

(e) Preventing contamination by employees.

(1) Preventing contamination from hands.

(A) Food employees shall wash their hands as specified under §229.163(f) of this title (relating to Management and Personnel).

(B) Except when washing fruits and vegetables as specified under subsection (f)(6) of this section or as specified in subparagraph (D) of this paragraph, food employees may not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment.

(C) Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-to-eat form.

(D) Food employees not serving a highly susceptible population may contact exposed, ready-to-eat food with their bare hands if:

(i) documentation is maintained at the food establishment that food employees acknowledge that they have received training in:

(I) the risks of contacting the specific ready-to-eat foods with bare hands;

(II) proper handwashing as specified under §229.163(f) of this title;

(III) when to wash their hands as specified under §229.163(h) of this title;

(IV) where to wash their hands as specified under §229.163(i) of this title;

(V) proper fingernail maintenance as specified under §229.163(k) of this title;

(VI) prohibition of jewelry as specified under §229.163(l) of this title;

(VII) good hygienic practices as related to §229.163(n) and §229.163(o) of this title; and

(VIII) employee health policies that detail how the food establishment complies with §229.163(d)(1) - (5) of this title;

(ii) documentation is maintained at the food establishment that food employees contacting ready-to-eat foods with bare hands utilize two or more of the following control measures to provide additional safeguards to hazards associated with bare hand contact:

(I) double handwashing;

(II) nail brushes;

(III) a hand sanitizer after handwashing as specified under §229.163(j) of this title;

(IV) incentive programs that assist or encourage food employees not to work when they are ill such as paid sick leave; or

(V) other control measures approved by the regulatory authority; and

(iii) documentation is maintained at the food establishment that corrective actions are taken when clauses (i) - (ii) of this subparagraph are not followed.

(2) Preventing contamination when tasting. A food employee may not use a utensil more than once to taste food that is to be sold or served.

(f) Preventing food and ingredient contamination.

(1) General. At all times, including while being stored, prepared, displayed, served, or transported, food shall be protected from potential contamination.

(2) Packaged and unpackaged food--separation, packaging, and segregation.

(A) Food shall be protected from cross contamination by:

(i) separating raw animal foods during storage, preparation, holding, and display from:

(I) raw ready-to-eat food including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as vegetables; and

(II) cooked ready-to-eat food;

(ii) except when combined as ingredients, separating types of raw animal foods from each other such as beef, fish, lamb, pork, and poultry during storage, preparation, holding, and display by:

(I) using separate equipment for each type; or

(II) arranging each type of food in equipment so that cross contamination of one type with another is prevented; and

(III) preparing each type of food at different times or in separate areas;

(iii) cleaning equipment and utensils as specified under §229.165(n)(1) of this title (relating to Equipment, Utensils, and Linens), and sanitizing as specified under §229.165(r) of this title;

(iv) except as specified in subparagraph (B) of this paragraph, storing the food in packages, covered containers, or wrappings;

(v) cleaning hermetically sealed containers of food of visible soil before opening;

(vi) protecting food containers that are received packaged together in a case or overwrap from cuts when the case or overwrap is opened;

(vii) storing damaged, spoiled, or recalled food being held in the food establishment as specified under §229.167(n) of this title; and

(viii) separating fruits and vegetables, before they are washed as specified under paragraph (6) of this subsection from ready-to-eat food.

(B) Subparagraph (A)(iv) of this paragraph does not apply to:

(i) whole, uncut, raw fruits and vegetables and nuts in the shell, that require peeling or hulling before consumption;

(ii) primal cuts, quarters, or sides of raw meat or slab bacon that are hung on clean, sanitized hooks or placed on clean, sanitized racks;

(iii) whole, uncut, processed meats such as country hams, and smoked or cured sausages that are placed on clean, sanitized racks;

(iv) food being cooled as specified under subsection (o)(5)(B)(ii) of this section; or

(v) shellstock.

(3) Food storage containers, identified with common name of food. Working containers holding food or food ingredients that are removed from their original packages for use in the food establishment, such as cooking oils, flour, herbs, potato flakes, salt, spices, and sugar shall be identified with the common name of the food except that containers holding food that can be readily and unmistakably recognized such as dry pasta need not be identified.

(4) Pasteurized eggs, substitute for raw shell eggs for certain recipes. Pasteurized eggs or egg products shall be substituted for raw shell eggs in the preparation of foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages that are not:

(A) cooked as specified under subsection (k)(1)(A)(i) or (ii) of this section; or

(B) included under subsection (k)(1)(D) of this section.

(5) Protection from unapproved additives.

(A) Food shall be protected from contamination that may result from the addition of, as specified in subsection (c)(2) of this section:

(i) unsafe or unapproved food or color additives; and

(ii) unsafe or unapproved levels of approved food and color additives.

(B) A food employee may not:

(i) apply sulfiting agents to fresh fruits and vegetables intended for raw consumption or to a food considered to be a good source of vitamin B1; or

(ii) serve or sell food specified under clause (i) of this subparagraph that is treated with sulfiting agents before receipt by the food establishment, except that grapes need not meet this subparagraph.

(6) Washing fruits and vegetables.

(A) Raw fruits and vegetables shall be thoroughly washed in water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form except as specified in subparagraph (B) of this paragraph of this section and except that whole, raw fruits and vegetables that are intended for washing by the consumer before consumption need not be washed before they are sold.

(B) Fruits and vegetables may be washed by using chemicals as specified under §229.168(f)(2) of this title (relating to Poisonous or Toxic Materials).

(g) Preventing contamination from ice used as a coolant.

(1) Ice used as exterior coolant, prohibited as ingredient. After use as a medium for cooling the exterior surfaces of food such as melons or fish, packaged foods such as canned beverages, or cooling coils and tubes of equipment, ice may not be used as food.

(2) Storage or display of food in contact with water or ice.

(A) Packaged food may not be stored in direct contact with ice or water if the food is subject to the entry of water because of the nature of its packaging, wrapping, or container or its positioning in the ice or water.

(B) Except as specified in subparagraphs (C) and (D) of this paragraph, unpackaged food may not be stored in direct contact with undrained ice.

(C) Whole, raw fruits or vegetables; cut, raw vegetables such as celery or carrot sticks or cut potatoes; and tofu may be immersed in ice or water.

(D) Raw chicken and raw fish that are received immersed in ice in shipping containers may remain in that condition while in storage awaiting preparation, display, service, or sale.

(h) Preventing contamination from equipment, utensils, and linens.

(1) Food contact with equipment and utensils. Food shall only contact surfaces of equipment and utensils that are cleaned as specified under §229.165(m) - (o) of this title, and sanitized as specified under §229.165(p) - (r) of this title.

(2) In-use utensils, between-use storage. During pauses in food preparation or dispensing, food preparation and dispensing utensils shall be stored:

(A) except as specified under subparagraph (B) of this paragraph, in the food with their handles above the top of the food and the container;

(B) in food that is not potentially hazardous with their handles above the top of the food within containers or equipment that can be closed, such as bins of sugar, flour, or cinnamon;

(C) on a clean portion of the food preparation table or cooking equipment only if the in-use utensil and the food-contact surface of the food preparation table or cooking equipment are cleaned and sanitized at a frequency specified under §229.165(n)(1) and (q) of this title;

(D) in running water of sufficient velocity to flush particulates to the drain, if used with moist food such as ice cream or mashed potatoes;

(E) in a clean, protected location if the utensils, such as ice scoops, are used only with a food that is not potentially hazardous; or

(F) in a container of water if the water is maintained at a temperature of at least 57 degrees Celsius (135 degrees Fahrenheit) and the container is cleaned at a frequency specified under §229.165(n)(1)(D)(vii) of this title.

(3) Linens and napkins, use limitation. Linens and napkins may not be used in contact with food unless they are used to line a container for the service of foods and the linens and napkins are replaced each time the container is refilled for a new consumer.

(4) Wiping cloths, use limitation.

(A) Cloths that are in use for wiping food spills shall be used for no other purpose.

(B) Cloths used for wiping food spills shall be:

(i) dry and used for wiping food spills from tableware and carry-out containers; or

(ii) wet and cleaned as specified under §229.165(t)(4) of this title, stored in a chemical sanitizer at a concentration specified in §229.165(k)(14) of this title, and used for wiping spills from food-contact and nonfood-contact surfaces of equipment.

(C) Dry or wet cloths that are used with raw animal foods shall be kept separate from cloths used for other purposes, and wet cloths used with raw animal foods shall be kept in a separate sanitizing solution.

(D) Wet wiping cloths used with a freshly made sanitizing solution and dry wiping cloths shall be free of food debris and visible soil.

(E) Working containers of sanitizing solutions for storage of in-use wiping cloths may be placed above the floor and used in a manner to prevent contamination of food, equipment, utensils, linens, single-service or single-use articles.

(5) Gloves, use limitation.

(A) If used, single-use gloves shall be used for only one task such as working with ready-to-eat food or with raw animal food, used for no other purpose, and discarded when damaged or soiled, or when interruptions occur in the operation.

(B) Except as specified in subparagraph (C) of this paragraph, slash-resistant gloves that are used to protect the hands during operations requiring cutting shall be used in direct contact only with

food that is subsequently cooked as specified under subsection (k) of this section such as frozen food or a primal cut of meat.

(C) Slash-resistant gloves may be used with ready-to-eat food that will not be subsequently cooked if the slash-resistant gloves have a smooth, durable, and nonabsorbent outer surface; or if the slash-resistant gloves are covered with a smooth, durable, nonabsorbent glove, or a single-use glove.

(D) Cloth gloves may not be used in direct contact with food unless the food is subsequently cooked as required under subsection (k) of this section such as frozen food or a primal cut of meat.

(6) Using clean tableware for second portions and refills.

(A) Except for refilling a consumer's drinking cup or container without contact between the pouring utensil and the lip-contact area of the drinking cup or container, food employees may not use tableware, including single-service articles, soiled by the consumer, to provide second portions or refills.

(B) Except as specified in subparagraph (C) of this paragraph, self-service consumers may not be allowed to use soiled tableware, including single-service articles, to obtain additional food from the display and serving equipment. A card, sign or other effective means of notification shall be displayed to notify consumers that clean tableware is to be used upon return to self-service areas such as salad bars and buffets.

(C) Drinking cups and containers may be reused by self-service consumers if refilling is a contamination-free process as specified under §229.165(f)(3)(A), (B), and (D) of this title.

(7) Refilling returnables.

(A) A take-home food container returned to a food establishment may not be refilled at a food establishment with a potentially hazardous food.

(B) Except as specified in subparagraph (C) of this paragraph, a take-home food container refilled with food that is not potentially hazardous shall be cleaned as specified in §229.165(o)(7)(B) of this title.

(C) Personal take-out beverage containers, such as thermally insulated bottles, nonspill coffee cups, and promotional beverage glasses, may be refilled by employees or the consumer if refilling is a contamination-free process as specified in §229.165(f)(3)(A), (B), and (D) of this title.

(i) Preventing contamination from the premises.

(1) Food storage.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, food shall be protected from contamination by storing the food:

(i) in a clean, dry location;

(ii) where it is not exposed to splash, dust, or other contamination; and

(iii) at least 15 cm (6 inches) above the floor.

(B) Food in packages and working containers may be stored less than 15 cm (6 inches) above the floor on case lot handling equipment as specified in §229.165(f)(22) of this title.

(C) Pressurized beverage containers, cased food in waterproof containers such as bottles or cans, and milk containers in plastic crates may be stored on a floor that is clean and not exposed to floor moisture.

(2) Food storage, prohibited areas. Food may not be stored:

(A) in locker rooms;

(B) in toilet rooms;

(C) in dressing rooms;

(D) in garbage rooms;

(E) in mechanical rooms;

(F) under sewer lines that are not shielded to intercept potential drips;

(G) under leaking water lines, including leaking automatic fire sprinkler heads, or under lines on which water has condensed;

(H) under open stairwells; or

(I) under other sources of contamination.

(3) Vended potentially hazardous food, original container. Potentially hazardous food dispensed through a vending machine shall be in the package in which it was placed at the food establishment or food processing plant at which it was prepared.

(4) Food preparation. During preparation, unpackaged food shall be protected from environmental sources of contamination.

(j) Preventing contamination by consumers.

(1) Food display. Except for nuts in the shell and whole, raw fruits and vegetables that are intended for hulling, peeling, or washing by the consumer before consumption, food on display shall be protected from contamination by the use of packaging; counter, service line, or salad bar food guards; display cases; or other effective means.

(2) Condiments, protection.

(A) Condiments shall be protected from contamination by being kept in dispensers that are designed to provide protection, protected food displays provided with the proper utensils, original containers designed for dispensing, or individual packages or portions.

(B) Condiments at a vending machine location shall be in individual packages or provided in dispensers that are filled at an approved location, such as the food establishment that provides food to the vending machine location, a food processing plant that is regulated by the agency that has jurisdiction over the operation, or a properly equipped facility that is located on the site of the vending machine location.

(3) Consumer self-service operations.

(A) Raw, unpackaged animal food, such as beef, lamb, pork, poultry, and fish may not be offered for consumer self-service. This paragraph does not apply to:

(i) consumer self-service of ready-to-eat foods at buffets or salad bars that serve foods such as sushi or raw shellfish;

(ii) ready-to-cook individual portions for immediate cooking and consumption on the premises such as consumer-cooked meats or consumer-selected ingredients for Mongolian barbecue; or

(iii) raw, frozen, shell-on shrimp or lobster.

(B) Consumer self-service operations for ready-to-eat foods shall be provided with suitable utensils or effective dispensing methods that protect the food from contamination.

(C) Consumer self-service operations such as buffets and salad bars shall be monitored by food employees trained in safe operating procedures.

(D) A person may sell unpackaged food that is not potentially hazardous, that is displayed, and sold in bulk from a self-service container if:

(i) the self-service container has a tight-fitting lid that is securely attached to the container; and

(ii) the container, lid and any utensil are constructed of nontoxic materials that provide for easy cleaning and proper repair.

(E) The lid of a gravity feed type container shall be kept closed except when the container is being serviced or refilled.

(F) The lid of a scoop utensil type container shall be kept closed except during customer service. The container must have a utensil, equipped with a handle, to be used in dispersing the food.

(G) The seller shall:

(i) keep the container, lid, and any utensil sanitary to prevent spoilage and insect infestation; and

(ii) post in the immediate display area a conspicuous sign that instructs the customer on the proper procedure for dispensing the food.

(4) Returned food and reservice of food.

(A) Except as specified in subparagraph (B) of this paragraph, after being served or sold and in the possession of a consumer, food that is unused or returned by the consumer may not be offered as food for human consumption.

(B) A container of food that is not potentially hazardous may be transferred from one consumer to another if:

(i) the food is dispensed so that it is protected from contamination and the container is closed between uses, such as a narrow-neck bottle containing catsup, steak sauce, or wine; or

(ii) the food, such as crackers, salt, or pepper, is in an unopened original package and is maintained in sound condition.

(5) Preventing contamination from other sources. Food shall be protected from contamination that may result from a factor or source not specified in subsections (e) - (j) of this section.

(k) Cooking.

(1) Raw animal foods.

(A) Except as specified under subparagraphs (B) - (D) of this paragraph, raw animal foods such as eggs, fish, meat, poultry, and foods containing these raw animal foods, shall be cooked to heat all parts of the food to a temperature and for a time that complies with one of the following methods based on the food that is being cooked:

(i) 63 degrees Celsius (145 degrees Fahrenheit) or above for 15 seconds for:

(I) raw shell eggs that are broken and prepared in response to a consumer's order and for immediate service; and

(II) except as specified under clauses (ii) and (iii) of this subparagraph, and subparagraph (B) of this paragraph, fish, meat, and pork including game animals and exotic animals commercially raised for food as specified under subsection (b)(7)(A)(i) and (b)(7)(B)(i) of this section and game animals under a voluntary inspection program as specified under subsection (b)(7)(B)(ii) of this section;

(ii) 68 degrees Celsius (155 degrees Fahrenheit) for 15 seconds or the temperature specified in the following chart that corresponds to the holding time for ratites and injected meats; the following if they are comminuted: fish, meat, game animals and exotic animals commercially raised for food as specified under subsection (b)(7)(A)(i) and (b)(7)(B)(i) of this section, and game animals and exotic animals under a voluntary inspection program as specified under subsection (b)(7)(B)(ii) of this section; and raw eggs that are not prepared as specified under clause (i)(I) of this subparagraph; or
Figure: 25 TAC §229.164(k)(1)(A)(ii)

(iii) 74 degrees Celsius (165 degrees Fahrenheit) or above for 15 seconds for poultry, wild game animals and exotic animals as specified under subsection (b)(7)(A)(iii) and (b)(7)(B)(iii) and (iv) of this section, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites.

(B) Whole beef roasts, corned beef roasts, pork roasts, and cured pork roasts such as ham, shall be cooked:

(i) in an oven that is preheated to the temperature specified for the roast's weight in the following chart and that is held at that temperature; and
Figure: 25 TAC §229.164(k)(1)(B)(i)

(ii) as specified in the following chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature.
Figure: 25 TAC §229.164(k)(1)(B)(ii)

(C) A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if:

(i) the food establishment serves a population that is not a highly susceptible population;

(ii) the steak is labeled to indicate that it meets the definition of "whole-muscle, intact beef" as specified under subsection (b)(1)(E) of this section; and

(iii) the steak is cooked on both the top and bottom to a surface temperature of 63 degrees Celsius (145 degrees Fahrenheit) or above and a cooked color change is achieved on all external surfaces.

(D) A raw animal food such as raw egg, raw fish, raw-marinated fish, raw molluscan shellfish, or steak tartare; or a partially cooked food such as lightly cooked fish, soft cooked eggs, or rare meat other than whole-muscle, intact beef steaks as specified in subparagraph (C) of this paragraph, may be served or offered for sale upon consumer request or selection in a ready-to-eat form if:

(i) as specified under subsection (u)(3)(A) and (B) of this section, the food establishment serves a population that is not a highly susceptible population; and

(ii) the consumer is informed as specified under subsection (s) of this section that to ensure its safety, the food should be cooked as specified under subparagraph (A) or (B) of this paragraph; or

(iii) the regulatory authority grants a variance from subparagraph (A) or (B) of this paragraph as specified in §229.171(c) of this title (relating to Compliance and Enforcement) based on a HACCP plan that:

(I) is submitted by the permit holder and approved as specified under §229.171(c)(2) of this title;

(II) documents scientific data or other information showing that a lesser time and temperature regimen results in a safe food; and

(III) verifies that equipment and procedures for food preparation and training of food employees at the food establishment meet the conditions of the variance.

(2) Microwave cooking. Raw animal foods cooked in a microwave oven shall be:

(A) rotated or stirred throughout or midway during cooking to compensate for uneven distribution of heat;

(B) covered to retain surface moisture;

(C) heated to a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) in all parts of the food; and

(D) allowed to stand covered for 2 minutes after cooking to obtain temperature equilibrium.

(3) Plant food cooking for hot holding. Fruits and vegetables that are cooked for hot holding shall be cooked to a temperature of 57 degrees Celsius (135 degrees Fahrenheit).

(l) Freezing.

(1) Parasite destruction. Except as specified in paragraph (2) of this subsection, before service or sale in ready-to-eat form, raw, raw-marinated, partially cooked, or marinated-partially cooked fish other than molluscan shellfish shall be:

(A) frozen and stored at a temperature of -20 degrees Celsius (-4 degrees Fahrenheit) or below for 168 hours (7 days) in a freezer; or

(B) frozen at -35 degrees Celsius (-31 degrees Fahrenheit) or below until solid and stored at -35 degrees Celsius (-31 degrees Fahrenheit) for 15 hours.

(2) If the fish are tuna of the species Thunnus alalunga, Thunnus albacares (Yellowfin tuna), Thunnus atlanticus, Thunnus maccoyii (Bluefin tuna, Southern), Thunnus obesus (Bigeye tuna), or Thunnus thynnus (Bluefin tuna, Northern), the fish may be served or sold in a raw, raw-marinated, or partially cooked ready-to-eat form without freezing as specified under paragraph (1) of this subsection.

(3) Records, creation and retention.

(A) Except as specified in paragraph (2) of this subsection and subparagraph (B) of this paragraph, if raw, raw-marinated, partially cooked, or marinated-partially cooked fish are served or sold in ready-to-eat form, the person in charge shall record the freezing temperature and time to which the fish are subjected and shall retain the records of the food establishment for 90 calendar days beyond the time of service or sale of the fish.

(B) If the fish are frozen by a supplier, a written agreement or statement from the supplier stipulating that the fish supplied are frozen to a temperature and for a time specified under paragraph (1) of this subsection, may substitute for the records specified under subparagraph (A) of this paragraph.

(m) Reheating.

(1) Preparation for immediate service. Cooked and refrigerated food that is prepared for immediate service in response to an individual consumer order, such as a roast beef sandwich au jus, may be served at any temperature.

(2) Reheating for hot holding.

(A) Except as specified under subparagraphs (B), (C) and in (E) of this paragraph, potentially hazardous food that is cooked, cooled, and reheated for hot holding shall be reheated so that all parts of the food reach a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) for 15 seconds.

(B) Except as specified under subparagraph (C) of this paragraph, potentially hazardous food reheated in a microwave oven for hot holding shall be reheated so that all parts of the food reach a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) and the food is rotated or stirred, covered, and allowed to stand covered for 2 minutes after reheating.

(C) Ready-to-eat food taken from a commercially processed, hermetically sealed container, or from an intact package from a food processing plant that is inspected by the food regulatory authority that has jurisdiction over the plant, shall be heated to a temperature of at least 57 degrees Celsius (135 degrees Fahrenheit) for hot holding.

(D) Reheating for hot holding shall be done rapidly and the time the food is between the temperature specified under subsection (o)(6)(B) of this section and 74 degrees Celsius (165 degrees Fahrenheit) may not exceed two hours.

(E) Remaining unsliced portions of roasts that are cooked as specified under subsection (k)(1)(B) of this section, may be reheated for hot holding using the oven parameters and minimum time and temperature conditions specified under subsection (k)(1)(B) of this section.

(n) Treating juice. Juice packaged in a food establishment shall be:

(1) treated under a HACCP plan as specified in §229.171(d)(2)(B) - (D) of this title (relating to Compliance and Enforcement) to attain a 5-log reduction, which is equal to a 99.999% reduction, of the most resistant microorganism of public health significance; or

(2) labeled, if not treated to yield a 5-log reduction of the most resistant microorganism of public health significance:

(A) as specified under subsection (r) of this section; and

(B) as specified in 21 CFR §101.17(g) with the phrase, "WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems."

(o) Temperature and time control.

(1) Frozen food. Stored frozen foods shall be maintained frozen.

(2) Potentially hazardous food, slacking. Frozen potentially hazardous food that is slacked to moderate the temperature shall be held:

(A) under refrigeration that maintains the food temperature at 5 degrees Celsius (41 degrees Fahrenheit) or less as specified in paragraph (6)(B)(i) of this subsection; or at 7 degrees Celsius (45 degrees Fahrenheit) or less as specified in paragraph (6)(B)(ii) of this subsection; or

(B) at any temperature if the food remains frozen.

(3) Thawing. Except as specified in subparagraph (D) of this paragraph, potentially hazardous food shall be thawed:

(A) under refrigeration that maintains the food temperature at 5 degrees Celsius (41 degrees Fahrenheit) or less as specified in paragraph (6)(B)(i) of this subsection; or at 7 degrees Celsius (45 degrees Fahrenheit) or less as specified in paragraph (6)(B)(ii) of this subsection; or

(B) completely submerged under running water:

(i) at a water temperature of 21 degrees Celsius (70 degrees Fahrenheit) or below;

(ii) with sufficient water velocity to agitate and float off loose particles in an overflow; and

(iii) for a period of time that does not allow thawed portions of ready-to-eat food to rise above 5 degrees Celsius (41 degrees Fahrenheit) as specified in paragraph (6)(B)(i) of this subsection, or 7 degrees Celsius (45 degrees Fahrenheit) as specified in paragraph (6)(B)(ii) of this subsection; or

(iv) for a period of time that does not allow thawed portions of a raw animal food requiring cooking as specified in subsection (k)(1)(A) or (B) of this section to be above 5 degrees Celsius (41 degrees Fahrenheit), or 7 degrees Celsius (45 degrees Fahrenheit) as specified in paragraph (6)(B)(ii) of this subsection, for more than 4 hours including:

(I) the time the food is exposed to the running water and the time needed for preparation for cooking; or

(II) the time it takes under refrigeration to lower the food temperature to 5 degrees Celsius (41 degrees Fahrenheit) as specified in paragraph (6)(B)(i) of this subsection, or 7 degrees Celsius (45 degrees Fahrenheit) as specified in paragraph (6)(B)(ii) of this subsection;

(C) as part of a cooking process if the food that is frozen is:

(i) cooked as specified in subsections (k)(1)(A) or (B) or (2) of this section; or

(ii) thawed in a microwave oven and immediately transferred to conventional cooking equipment, with no interruption in the process; or

(D) using any procedure if a portion of frozen ready-to-eat food is thawed and prepared for immediate service in response to an individual consumer's order.

(4) Cooling.

(A) Cooked potentially hazardous food shall be cooled:

(i) within two hours, from 57 degrees Celsius (135 degrees Fahrenheit) to 21 degrees C (70 degrees Fahrenheit); and

(ii) within a total of six hours, from 57 degrees Celsius (135 degrees Fahrenheit) to 5 degrees Celsius (41 degrees Fahrenheit) or less as specified in paragraph (6)(B)(i) of this subsection, or to 7 degrees Celsius (45 degrees Fahrenheit) or less as specified in paragraph (6)(B)(ii) of this subsection.

(B) Potentially hazardous food shall be cooled within four hours to 5 degrees Celsius (41 degrees Fahrenheit) or less, or to 7 degrees Celsius (45 degrees Fahrenheit) or less as specified in paragraph (6)(B) of this subsection if prepared from ingredients at ambient temperature, such as reconstituted foods and canned tuna.

(C) Except as specified in subparagraph (D) of this paragraph, a potentially hazardous food received in compliance with laws allowing a temperature above 5 degrees Celsius (41 degrees Fahrenheit) during shipment from the supplier as specified in subsection (c)(1)(B) of this section, shall be cooled within four hours to 5 degrees Celsius (41 degrees Fahrenheit) or less, or to 7 degrees Celsius (45 degrees Fahrenheit) or less as specified in paragraph (6)(B) of this subsection.

(D) Raw shell eggs shall be received as specified under subsection (c)(1)(C) of this section and immediately placed in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.

(5) Cooling methods.

(A) Cooling shall be accomplished in accordance with the time and temperature criteria specified under paragraph (4) of this subsection by using one or more of the following methods based on the type of food being cooled:

(i) placing the food in shallow pans;

(ii) separating the food into smaller or thinner portions;

(iii) using rapid cooling equipment;

(iv) stirring the food in a container placed in an ice water bath;

(v) using containers that facilitate heat transfer;

(vi) adding ice as an ingredient; or

(vii) other effective methods.

(B) When placed in cooling or cold holding equipment, food containers in which food is being cooled shall be:

(i) arranged in the equipment to provide maximum heat transfer through the container walls; and

(ii) loosely covered, or uncovered if protected from overhead contamination as specified under subsection (i)(1)(A)(ii) of this section, during the cooling period to facilitate heat transfer from the surface of the food.

(6) Potentially hazardous food, hot and cold holding. Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under paragraph (9) of this subsection, and except as specified in subparagraph (B) of this paragraph, potentially hazardous food shall be maintained:

(A) at 57 degrees Celsius (135 degrees Fahrenheit) or above, except that roasts cooked to a temperature and for a time specified in subsection (k)(1)(B) of this section or reheated as specified in subsection (m)(2)(E) of this section may be held at a temperature of 54 degrees Celsius (130 degrees Fahrenheit) or above; or

(B) at a temperature specified in the following:

(i) 5 degrees Celsius (41 degrees Fahrenheit) or less; or

(ii) 7 degrees Celsius (45 degrees Fahrenheit) or less in countertop, under-counter and open-top refrigeration units located in the food preparation area that were in use prior to October 6, 2003, provided the food is date marked as specified in paragraphs (7) - (9) of this subsection.

(C) Shell eggs that have not been treated to destroy all viable Salmonellae shall be stored in refrigerated equipment that maintains an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) or less.

(7) Ready-to-eat, potentially hazardous food, date marking.

(A) Except as specified in subparagraphs (D) - (F) of this paragraph refrigerated, ready-to-eat, potentially hazardous food prepared and held in a food establishment for more than 24 hours shall be clearly marked using calendar dates, days of the week, color-coded marks, or other effective means to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified below. The day of preparation shall be counted as Day 1.

(i) 5 degrees Celsius (41 degrees Fahrenheit) or less for a maximum of seven days; or

(ii) 7 degrees Celsius (45 degrees Fahrenheit) or for a maximum of four days in countertop, under-counter and open-top refrigeration units located in the food preparation area and were in use prior to October 6, 2003, as specified in paragraph (6)(B)(ii) of this subsection.

(B) Except as specified in subparagraphs (D) - (G) of this paragraph, refrigerated, ready-to-eat, potentially hazardous food prepared and packaged by a food processing plant shall be clearly marked using calendar dates, days of the week, color-coded marks, or other effective means, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in subparagraph (A) of this paragraph:

(i) the day the original container is opened in the food establishment shall be counted as Day 1; and

(ii) the day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.

(C) A refrigerated, ready-to-eat potentially hazardous food that is frequently rewrapped, such as lunchmeat or a roast, or for which date marking is impractical, such as soft serve mix or milk in a dispensing machine, may be marked as specified in subparagraphs (A) or (B) of this paragraph or by an alternative method acceptable to the regulatory authority.

(D) Alternative date marking systems must receive prior approval from the regulatory authority.

(E) Subparagraph (B) of this paragraph does not apply to the following cheeses that are maintained under refrigeration as specified in paragraph (6)(B) of this subsection:

(i) hard cheeses manufactured as specified in 21 CFR §133.150, and with a moisture content not exceeding 39%, such as cheddar, gruyere, parmesan, reggiano, and romano;

(ii) semisoft cheeses manufactured as specified in 21 CFR §133.187, and with a moisture content of more than 39% but less than 50%, such as blue, edam, gorgonzola, gouda, and monterey jack; or

(iii) pasteurized process cheeses manufactured as specified in 21 CFR §133.169, and labeled as containing an acidifying agent.

(F) Subparagraphs (A) and (B) of this paragraph do not apply to individual meal portions served or repackaged for sale from a bulk container upon a consumer's request.

(G) Subparagraph (B) of this paragraph does not apply to the following when the face has been cut, but the remaining portion is whole and intact:

(i) fermented sausages produced in a federally inspected food processing plant that are not labeled "Keep Refrigerated" and which retain the original casing on the product;

(ii) shelf stable, dry, fermented sausages; and

(iii) shelf stable salt-cured products such as prosciutto and Parma (ham) produced in a federally inspected food processing plant that are not labeled "Keep Refrigerated".

(H) Subparagraph (B) of this paragraph does not apply to cultured dairy products as defined in 21 CFR 131, Milk and Cream, such as yogurt, sour cream, and buttermilk, that are maintained under refrigeration as specified in paragraph (6)(B) of this subsection.

(I) Subparagraph (B) of this paragraph does not apply to preserved fish products, such as pickled herring, and dried or salted cod, and other acidified fish products defined in 21 CFR 114, Acidified Foods.

(J) A refrigerated, ready-to-eat, potentially hazardous food ingredient or a portion of a refrigerated, ready-to-eat, potentially hazardous food that is subsequently combined with additional ingredients or portions of food shall retain the date marking of the earliest-prepared or first-prepared ingredient.

(8) Ready-to-eat, potentially hazardous food, disposition.

(A) A food specified in paragraph (7)(A) or (B) of this subsection shall be discarded if it:

(i) exceeds either of the temperature and time combinations specified in paragraph (7)(A) of this subsection, except time that the product is frozen;

(ii) is in a container or package that does not bear a date or day; or

(iii) is appropriately marked with a date or day that exceeds a temperature and time combination as specified in paragraph (7)(A) of this subsection.

(B) Refrigerated, ready-to-eat, potentially hazardous food prepared in a food establishment and dispensed through a vending machine with an automatic shutoff control shall be discarded if it exceeds a temperature and time combination as specified in paragraph (7)(A) of this subsection.

(9) Time as a public health control.

(A) Except as specified under subparagraph (B) of this paragraph, if time only, rather than time in conjunction with temperature, is used as the public health control for a working supply of potentially hazardous food before cooking, or for ready-to-eat potentially hazardous food that is displayed or held for service for immediate consumption:

(i) the food shall be marked or otherwise identified to indicate the time that is four hours past the point in time when the food is removed from temperature control;

(ii) the food shall be cooked and served, served if ready-to-eat, or discarded, within 4 hours from the point in time when the food is removed from temperature control;

(iii) the food in unmarked containers or packages or marked to exceed a four hour limit shall be discarded; and

(iv) written procedures shall be maintained in the food establishment and made available to the regulatory authority upon request, that ensure compliance with:

(I) clauses (i) - (iv) of this subparagraph, and

(II) paragraph (4) of this subsection for food that is prepared, cooked, and refrigerated before time is used as a public health control.

(B) In a food establishment that serves a highly susceptible population, time only, rather than time in conjunction with temperature, may not be used as the public health control for raw eggs.

(p) Specialized processing methods.

(1) Variance requirement. A food establishment shall obtain a variance from the department as specified in §229.171(c)(1) and (2) of this title before:

(A) smoking food as a method of food preservation rather than as a method of flavor enhancement;

(B) curing food;

(C) using food additives or adding components such as vinegar:

(i) as a method of food preservation rather than as a method of flavor enhancement; or

(ii) to render a food so that it is not potentially hazardous;

(D) packaging food using a reduced oxygen packaging method except as specified under paragraph (2) of this subsection where a barrier to Clostridium botulinum in addition to refrigeration exists;

(E) operating a molluscan shellfish life-support system display tank used to store and display shellfish that are offered for human consumption;

(F) custom processing animals that are for personal use as food and not for sale or service in a food establishment;

(G) preparing food by another method that is determined by the regulatory authority to require a variance; or

(H) sprouting seeds or beans in a retail food establishment.

(2) Clostridium botulinum controls, reduced oxygen packaging criteria.

(A) Except for a food establishment that obtains a variance as specified under paragraph (1) of this subsection, a food establishment that packages food using a reduced oxygen packaging method and Clostridium botulinum is identified as a microbiological hazard in the final packaged form shall ensure that there are at least two barriers in place to control the growth and toxin formation of C. botulinum.

(B) A food establishment that packages food using a reduced oxygen packaging method and Clostridium botulinum is identified as a microbiological hazard in the final packaged form shall have a HACCP plan that contains the information specified under §229.171(d)(2)(D) of this title, and that:

(i) identifies the food to be packaged;

(ii) limits the food packaged to a food that does not support the growth of Clostridium botulinum because it complies with one of the following:

(I) has an a_w of 0.91 or less;

(II) has a pH of 4.6 or less;

(III) is a meat or poultry product cured at a food processing plant regulated by the USDA or the department using substances specified in 9 CFR §424.21, Use of food ingredients and sources of radiation, and is received in an intact package; or

(IV) is a food with a high level of competing organisms such as raw meat or raw poultry;

(iii) specifies methods for maintaining food at 5 degrees Celsius (41 degrees Fahrenheit) or below;

(iv) describes how the packages shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:

(I) maintain the food at 5 degrees Celsius (41 degrees Fahrenheit) or below; and

(II) for food held at refrigeration temperatures, discard the food if within 14 calendar days of its packaging it is not served for on-premises consumption, or consumed if served or sold for off-premises consumption;

(v) limits the refrigerated shelf life to no more than 14 calendar days from packaging to consumption, except the time the product is maintained frozen, or the original manufacturer's "sell by" or "use by" date, whichever occurs first;

(vi) includes operational procedures that:

(I) prohibit contacting food with bare hands;

(II) identify a designated area and the method by which:

(-a-) physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross contamination; and

(-b-) access to the processing equipment is limited to responsible trained personnel familiar with the potential hazards of the operation; and

(III) delineate cleaning and sanitization procedures for food-contact surfaces; and

(vii) describes the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:

(I) concepts required for a safe operation;

(II) equipment and facilities; and

(III) procedures specified under clause (vi) of this subparagraph and §229.171(d)(2)(D) of this title.

(C) Except for fish that is frozen before, during, and after packaging, a food establishment may not package fish using a reduced oxygen packaging method.

(q) Food identity, accurate representation.

(1) Standards of identity. Packaged food shall comply with standard of identity requirements in 21 CFR 131 - 169, and 9 CFR 319, Definitions and Standards of Identity or Composition, and the general requirements in 21 CFR 130, Food Standards: General, and 9 CFR 319, Subpart A, General.

(2) Honestly presented.

(A) Food shall be offered for human consumption in a way that does not mislead or misinform the consumer.

(B) Food or color additives, colored overwraps, or lights may not be used to misrepresent the true appearance, color, or quality of a food.

(r) Labeling.

(1) Food labels.

(A) Food packaged in a food establishment, shall be labeled as specified in law, including 21 CFR 101, Food Labeling, 9 CFR 317, Labeling, Marking Devices, and Containers, and 9 CFR 381, Subpart N, Labeling and Containers.

(B) Label information shall include:

(i) the common name of the food, or absent a common name, an adequately descriptive identity statement;

(ii) if made from two or more ingredients, a list of ingredients in descending order of predominance by weight, including a declaration of artificial color or flavor and chemical preservatives, if contained in the food;

(iii) an accurate declaration of the quantity of contents;

(iv) the name and place of business of the manufacturer, packer, or distributor;

(v) except as exempted in the Federal Food, Drug, and Cosmetic Act §403(Q)(3) - (5), nutrition labeling as specified in 21 CFR 101, Food Labeling, and 9 CFR 317, Subpart B, Nutrition Labeling; and

(vi) for any salmonid fish containing canthaxanthin as a color additive, the labeling of the bulk fish container, including a list of ingredients, displayed on the retail container or by other written means, such as a counter card, that discloses the use of canthaxanthin.

(C) Bulk food that is available for consumer self-dispensing shall be prominently labeled with the following information in plain view of the consumer:

(i) the manufacturer's or processor's label that was provided with the food; or

(ii) a card, sign, or other method of notification that includes the information specified under subparagraph (B)(i), (ii), and (v) of this paragraph.

(D) Bulk, unpackaged foods such as bakery products and unpackaged foods that are portioned to consumer specification need not be labeled if:

(i) a health, nutrient content, or other claim is not made;

(ii) the food is manufactured or prepared on the premises of the food establishment or at another food establishment or a food processing plant that is owned by the same person and is regulated by the food regulatory agency that has jurisdiction; and

(iii) ingredients contained in the food, including potential allergens, are provided to the consumer on request from a recipe book or by other means.

(E) Menu claims.

(i) If a nutrient content claim or health claim is made, such claims shall conform to the definitions of such terms found in 21 CFR 101.

(ii) Claims must be capable of being substantiated. Substantiation may be based upon a recipe for the food, or a database developed and tested nationally and acceptable to the regulatory authority. Evidence of substantiation must be supplied to the regulatory authority upon request.

(iii) Nutritional information must be available to the consumer upon request for any food for which a nutrient content claim or health claim is made.

(2) Other forms of information.

(A) If required by law, consumer warnings shall be provided.

(B) Food establishment or manufacturers' dating information on foods may not be concealed or altered.

(s) Consumer advisory.

(1) Except as specified in subsection (k)(1)(C) of this section and under subsection (u)(3) of this section, if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat food, the permit holder shall inform consumers of the significantly increased risk of consuming such foods by way of a disclosure and reminder, as specified in paragraphs (2) and (3) of this subsection, using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.

(2) Disclosure shall include:

(A) a description of the animal-derived foods, such as "oysters on the half shell (raw oysters)," "raw-egg Caesar salad," and "hamburgers (can be cooked to order);" or

(B) identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain (or may contain) raw or undercooked ingredients.

(3) Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:

(A) regarding the safety of these items, written information is available upon request;

(B) consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness; or

(C) consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.

(t) Disposition, contaminated food.

(1) A food that is unsafe, adulterated, or not honestly presented as specified under subsection (a) of this section shall be reconditioned according to an approved procedure or discarded.

(2) Food that is not from an approved source as specified under subsection (b)(1) - (7) of this section shall be discarded.

(3) Ready-to-eat food that may have been contaminated by an employee who has been restricted or excluded as specified under §229.163(d)(2) of this title (relating to Management and Personnel) shall be discarded.

(4) Food that is contaminated by food employees, consumers, or other persons through contact with their hands, bodily discharges, such as nasal or oral discharges, or other means shall be discarded.

(u) Additional safeguards, requirements for food establishments serving highly susceptible populations. Pasteurized foods and prohibited food. In a food establishment that serves a highly susceptible population:

(1) the following criteria shall apply to juice:

(A) for the purposes of this paragraph only, children who are age nine or less and receive food in a school, day care setting or similar facility that provides custodial care are included as highly susceptible populations;

(B) prepackaged juice or a prepackaged beverage containing juice, that bears a warning label as specified in 21 CFR §101.17(g), Food Labeling, or packaged juice or beverage containing

juice, that bears a warning label as specified under subsection (n)(2) of this section may not be served or offered for sale; and

(C) unpackaged juice that is prepared on the premises for service or sale in a ready-to-eat form shall be processed under a HACCP plan that contains the information specified in §229.171(d)(2)(B) - (E) of this title, and as specified under 21 CFR 120, Hazard Analysis And Critical Control Point (HACCP) Systems, §120.24, Process Controls;

(2) pasteurized shell eggs or pasteurized liquid, frozen, or dry eggs or egg products shall be substituted for raw shell eggs in the preparation of:

(A) foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, eggnog, ice cream, and egg-fortified beverages; and

(B) except as specified in paragraph (5) of this subsection, recipes in which more than one egg is broken and the eggs are combined;

(3) the following foods may not be served or offered for sale in a ready-to-eat form:

(A) raw animal foods such as raw fish, raw-marinated fish, raw molluscan shellfish, and steak tartare;

(B) a partially cooked animal food such as lightly cooked fish, rare meat, soft-cooked eggs that are made from raw shell eggs, and meringue; and

(C) raw seed sprouts;

(4) food employees may not contact ready-to-eat food as specified under subsection (e)(1)(B) and (D) of this section;

(5) time only, as the public health control as specified under subsection (o)(9)(B) of this section, may not be used for raw eggs;

(6) paragraph (2)(B) of this subsection does not apply if:

(A) the raw eggs are combined immediately before cooking for one consumer's serving at a single meal, cooked as specified under subsection (k)(1)(A)(i) of this section, and served immediately, such as an omelet, soufflé, or scrambled eggs;

(B) the raw eggs are combined as an ingredient immediately before baking and the eggs are thoroughly cooked to a ready-to-eat form, such as a cake, muffin, or bread; or

(C) the preparation of the food is conducted under a HACCP plan that:

(i) identifies the food to be prepared;

(ii) prohibits contacting ready-to-eat food with bare hands;

(iii) includes specifications and practices that ensure:

(I) Salmonella Enteritidis growth is controlled before and after cooking; and

(II) Salmonella Enteritidis is destroyed by cooking the eggs according to the temperature and time specified in subsection (k)(1)(A)(ii) of this section;

(iv) contains the information specified under §229.171(d)(2)(D) of this title (relating to Compliance and Enforcement) including procedures that:

(I) control cross contamination of ready-to-eat food with raw eggs; and

(II) delineate cleaning and sanitization procedures for food-contact surfaces; and

(v) describes the training program that ensures that the food employee responsible for the preparation of the food understands the procedures to be used;

(7) except as specified in paragraph (8) of this subsection, food may be re-served as specified under subsection (j)(4)(B)(i) and (ii) of this section; and

(8) food may not be re-served under the following conditions:

(A) any food served to patients or clients who are under contact precautions in medical isolation or quarantine, protective environmental isolation may not be reserved to others outside; and

(B) packages of food from any patients, client, or other consumers should not be re-served to persons in protective environment isolation.

(v) Donation of foods.

(1) Previous service. Foods which have been previously served to a consumer may not be donated.

(2) Potentially hazardous foods. A potentially hazardous food may be donated if:

(A) the food has been kept at or above 57 degrees Celsius (135 degree Fahrenheit) during hot holding and service, and subsequently refrigerated to meet the time and temperature requirements under subsection (o)(4) and (5) of this section;

(B) the donor can substantiate that the food recipient has the facilities to meet the transportation, storage, and reheating requirements of these rules;

(C) the temperature of the food is at or below 5 degrees Celsius (41 degrees Fahrenheit) at the time of donation, and is protected from contamination; and

(D) if the food is to be transported by the recipient directly to a consumer, the recipient need meet only the transportation requirements, including holding temperatures, under these rules.

(3) Labeling. Donated foods shall be labeled with the name of the food, the source of the food, and the date of preparation.

(4) Shelf life. Donated potentially hazardous foods may not exceed the shelf life for leftover foods outlined in these rules.

(5) Damaged foods. Heavily rim or seam-dented canned foods, or packaged foods without the manufacturer's complete labeling, shall not be donated.

(6) Distressed foods. Foods which are considered distressed, such as foods which have been subjected to fire, flooding, excessive heat, smoke, radiation, other environmental contamination, or prolonged storage shall not be directly donated for consumption by the consumer. Such foods may be sold or donated to a licensed food salvage establishment if permitted under the provisions of the Health and Safety Code, Chapter 432.

§229.165. Equipment, Utensils, and Linens.

(a) Multiuse materials.

(1) Characteristics. Materials that are used in the construction of utensils and food-contact surfaces of equipment may not allow the migration of deleterious substances or impart colors, odors, or tastes to food and under normal use conditions shall be:

(A) safe;

(B) durable, corrosion-resistant, and nonabsorbent;

(C) sufficient in weight and thickness to withstand repeated warewashing;

(D) finished to have a smooth, easily cleanable surface; and

(E) resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition.

(2) Cast iron, use limitation.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, cast iron may not be used for utensils or food-contact surfaces of equipment.

(B) Cast iron may be used as a surface for cooking.

(C) Cast iron may be used in utensils for serving food if the utensils are used only as part of an uninterrupted process from cooking through service.

(3) Lead in ceramic, china, and crystal utensils, use limitation. Ceramic, china, crystal utensils, and decorative utensils such as hand-painted ceramic or china that are used in contact with food shall be lead-free or contain levels of lead not exceeding the limits in the following table:
Figure: 25 TAC §229.165(a)(3)

(4) Copper, use limitation.

(A) Except as specified in subparagraph (B) of this paragraph, copper and copper alloys such as brass may not be used in contact with a food that has a pH below 6 such as vinegar, fruit juice, or wine or for a fitting or tubing installed between a backflow prevention device and a carbonator.

(B) Copper and copper alloys may be used in contact with beer brewing ingredients that have a pH below 6 in the prefermentation and fermentation steps of a beer brewing operation such as a brewpub or microbrewery.

(5) Galvanized metal, use limitation. Galvanized metal may not be used for utensils or food-contact surfaces of equipment that are used in contact with acidic food.

(6) Sponges, use limitation. Sponges may not be used in contact with cleaned and sanitized or in-use food-contact surfaces.

(7) Lead in pewter alloys, use limitation. Pewter alloys containing lead in excess of 0.05% may not be used as a food-contact surface.

(8) Lead in solder and flux, use limitation. Solder and flux containing lead in excess of 0.2% may not be used as a food-contact surface.

(9) Wood, use limitation.

(A) Except as specified in subparagraphs (B) - (D) of this paragraph, wood and wood wicker may not be used as a food-contact surface.

(B) Hard maple or an equivalently hard, close-grained wood may be used for:

(i) cutting boards; cutting blocks; bakers' tables; and utensils such as rolling pins, doughnut dowels, salad bowls, and chopsticks; and

(ii) wooden paddles used in confectionery operations for pressure scraping kettles when manually preparing confections at a temperature of 110 degrees Celsius (230 degrees Fahrenheit) or above.

(C) Whole, uncut, raw fruits and vegetables, and nuts in the shell may be kept in the wood shipping containers in which they were received, until the fruits, vegetables, or nuts are used.

(D) If the nature of the food requires removal of rinds, peels, husks, or shells before consumption, the whole, uncut, raw food may be kept in:

(i) untreated wood containers; or

(ii) treated wood containers if the containers are treated with a preservative that meets the requirements specified in 21 CFR §178.3800, Preservatives for Wood.

(10) Nonstick coatings, use limitation. Multiuse kitchenware such as frying pans, griddles, sauce pans, cookie sheets, and waffle bakers that have a perfluorocarbon resin coating shall be used with nonscoring or nonscratching utensils and cleaning aids.

(11) Nonfood-contact surfaces. Nonfood-contact surfaces of equipment that are exposed to splash, spillage, or other food soiling or that require frequent cleaning shall be constructed of a corrosion-resistant, nonabsorbent, and smooth material.

(b) Single-service and single-use, characteristics. Materials that are used to make single-service and single-use articles:

(1) may not:

(A) allow the migration of deleterious substances; or

(B) impart colors, odors, or tastes to food; and

(2) shall be:

(A) safe; and

(B) clean.

(c) Durability and strength.

(1) Equipment and utensils. Equipment and utensils shall be designed and constructed to be durable and to retain their characteristic qualities under normal use conditions.

(2) Food temperature measuring devices. Food temperature measuring device may not have sensors or stems constructed of glass, except that thermometers with glass sensors or stems that are encased in a shatterproof coating such as candy thermometers may be used.

(d) Cleanability.

(1) Food-contact surfaces. Multiuse food-contact surfaces shall be:

(A) smooth;

(B) free of breaks, open seams, cracks, chips, inclusions, pits, and similar imperfections;

(C) free of sharp internal angles, corners, and crevices;

(D) finished to have smooth welds and joints; and

(E) except as specified in subparagraph (B) of this paragraph, accessible for cleaning and inspection by one of the following methods:

(i) without being disassembled;

(ii) by disassembling without the use of tools; or

(iii) by easy disassembling with the use of handheld tools commonly available to maintenance and cleaning personnel such as screwdrivers, pliers, and wrenches.

(2) Paragraph (5) of this subsection does not apply to cooking oil storage tanks, distribution lines for cooking oils, or beverage syrup lines or tubes.

(3) Cleaned in place (CIP) equipment.

(A) CIP equipment shall meet the characteristics specified under paragraph (1) of this subsection and shall be designed and constructed so that:

(i) cleaning and sanitizing solutions circulate throughout a fixed system and contact all interior food-contact surfaces; and

(ii) the system is self-draining or capable of being completely drained of cleaning and sanitizing solutions; and

(B) CIP equipment that is not designed to be disassembled for cleaning shall be designed with inspection access points to ensure that all interior food-contact surfaces throughout the fixed system are being effectively cleaned.

(4) "V" threads, use limitation. Except for hot oil cooking or filtering equipment, "V" type threads may not be used on food-contact surfaces.

(5) Hot oil filtering equipment. Hot oil filtering equipment shall meet the characteristics specified under paragraph (1) or (2) of this subsection and shall be readily accessible for filter replacement and cleaning of the filter.

(6) Can openers. Cutting or piercing parts of can openers shall be readily removable for cleaning and for replacement.

(7) Nonfood-contact surfaces. Nonfood-contact surfaces shall be free of unnecessary ledges, projections, and crevices, and designed and constructed to allow easy cleaning and to facilitate maintenance.

(8) Kick plates, removable. Kick plates shall be designed so that the areas behind them are accessible for inspection and cleaning by being:

(A) removable by one of the methods specified under paragraph (1)(E) of this subsection or capable of being rotated open; and

(B) removable or capable of being rotated open without unlocking equipment doors.

(9) Ventilation hood systems, filters. Filters or other grease extracting equipment shall be designed to be readily removable for cleaning and replacement if not designed to be cleaned in place.

(e) Accuracy of temperature measuring devices, food.

(1) Temperature measuring device, food.

(A) Food temperature measuring device that are scaled only in Celsius or dually scaled in Celsius and Fahrenheit shall be accurate to ±1 degrees Celsius in the intended range of use.

(B) Food temperature measuring device that are scaled only in Fahrenheit shall be accurate to ±2 degrees Fahrenheit in the intended range of use.

(2) Temperature measuring devices, ambient air and water.

(A) Ambient air and water temperature measuring device that are scaled in Celsius or dually scaled in Celsius and Fahrenheit shall be designed to be easily readable and accurate to ±1.5 degrees Celsius in the intended range of use.

(B) Ambient air and water temperature measuring device that are scaled only in Fahrenheit shall be accurate to ±3 degrees Fahrenheit in the intended range of use.

(3) Pressure measuring devices, mechanical warewashing equipment. Pressure measuring devices that display the pressures in the water supply line for the fresh hot water sanitizing rinse shall have increments of 7 kilopascals (1 pounds per square inch) or smaller and shall be accurate to ±14 kilopascals (±2 pounds per square inch) in the 100 - 170 kilopascals (15 - 25 pounds per square inch) range.

(f) Functionality of equipment.

(1) Ventilation hood systems, drip prevention. Exhaust ventilation hood systems in food preparation and warewashing areas including components such as hoods, fans, guards, and ducting shall be designed to prevent grease or condensation from draining or dripping onto food, equipment, utensils, linens, and single-service and single-use articles.

(2) Equipment openings, closures and deflectors.

(A) A cover or lid for equipment shall overlap the opening and be sloped to drain.

(B) An opening located within the top of a unit of equipment that is designed for use with a cover or lid shall be flanged upward at least 5 millimeters (two-tenths of an inch).

(C) Except as specified under subparagraph (D) of this paragraph, fixed piping, temperature measuring device, rotary shafts, and other parts extending into equipment shall be provided with a watertight joint at the point where the item enters the equipment.

(D) If a watertight joint is not provided:

(i) the piping, temperature measuring device, rotary shafts, and other parts extending through the openings shall be equipped with an apron designed to deflect condensation, drips, and dust from openings into the food; and

(ii) the opening shall be flanged as specified under subparagraph (B) of this paragraph.

(3) Dispensing equipment, protection of equipment and food. In equipment that dispenses or vends liquid food or ice in unpackaged form:

(A) the delivery tube, chute, orifice, and splash surfaces directly above the container receiving the food shall be designed in a manner, such as with barriers, baffles, or drip aprons, so that drips from condensation and splash are diverted from the opening of the container receiving the food;

(B) the delivery tube, chute, and orifice shall be protected from manual contact such as by being recessed;

(C) the delivery tube or chute and orifice of equipment used to vend liquid food or ice in unpackaged form to self-service consumers shall be designed so that the delivery tube or chute and orifice are protected from dust, insects, rodents, and other contamination by a self-closing door if the equipment is:

(i) located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment; or

(ii) available for self-service during hours when it is not under the full-time supervision of a food employee; and

(D) the dispensing equipment actuating lever or mechanism and filling device of consumer self-service beverage dispensing equipment shall be designed to prevent contact with the lip-contact surface of glasses or cups that are refilled.

(4) Vending machine, vending stage closure. The dispensing compartment of a vending machine including a machine that is designed to vend prepackaged snack food that is not potentially hazardous such as chips, party mixes, and pretzels shall be equipped with a self-closing door or cover if the machine is:

(A) located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment; or

(B) available for self-service during hours when it is not under the full-time supervision of a food employee.

(5) Bearings and gear boxes, leakproof. Equipment containing bearings and gears that require lubricants shall be designed and constructed so that the lubricant can not leak, drip, or be forced into food or onto food-contact surfaces.

(6) Beverage tubing, separation. Beverage tubing and cold-plate beverage cooling devices may not be installed in contact with stored ice. This section does not apply to cold plates that are constructed integrally with an ice storage bin.

(7) Ice units, separation of drains. Liquid waste drain lines may not pass through an ice machine or ice storage bin.

(8) Condenser unit, separation. If a condenser unit is an integral component of equipment, the condenser unit shall be separated from the food and food storage space by a dustproof barrier.

(9) Can openers on vending machines. Cutting or piercing parts of can openers on vending machines shall be protected from manual contact, dust, insects, rodents, and other contamination.

(10) Molluscan shellfish tanks.

(A) Except as specified under subparagraph (B) of this paragraph, molluscan shellfish life support system display tanks may not be used to display shellfish that are offered for human consumption and shall be conspicuously marked so that it is obvious to the consumer that the shellfish are for display only.

(B) Molluscan shellfish life-support system display tanks that are used to store and display shellfish that are offered for human consumption shall be operated and maintained in accordance with a HACCP plan that:

(i) is submitted by the permit holder and approved by the regulatory authority as specified under §229.171(c) of this title (relating to Compliance and Enforcement); and

(ii) ensures that:

(I) water used with fish other than molluscan shellfish does not flow into the molluscan tank;

(II) the safety and quality of the shellfish as they were received are not compromised by the use of the tank; and

(III) the identity of the source of the shellstock is retained as specified under §229.164(d)(5) of this title (relating to Food), and the source information is displayed with the shellstock as required in §229.164(c)(8) of this title.

(11) Vending machines, automatic shutoff.

(A) A machine vending potentially hazardous food shall have an automatic control that prevents the machine from vending food:

(i) if there is a power failure, mechanical failure, or other condition that results in an internal machine temperature that can not maintain food temperatures as specified under §229.164 of this title; and

(ii) if a condition specified under clause (i) of this subparagraph occurs, until the machine is serviced and restocked with food that has been maintained at temperatures specified under Chapter 3.

(B) When the automatic shutoff within a machine vending potentially hazardous food is activated:

(i) in a refrigerated vending machine, the ambient temperature may not exceed any time/temperature combination as specified under §229.164(o)(6)(B) of this title for more than 30 minutes immediately after the machine is filled, serviced, or restocked; or

(ii) in a hot holding vending machine, the ambient temperature may not be less than 57 degrees Celsius (135 degrees Fahrenheit) for more than 120 minutes immediately after the machine is filled, serviced, or restocked.

(12) Temperature measuring devices.

(A) In a mechanically refrigerated or hot food storage unit, the sensor of a temperature measuring device shall be located to measure the air temperature or a simulated product temperature in the warmest part of a mechanically refrigerated unit and in the coolest part of a hot food storage unit.

(B) Except as specified in subparagraph (C) of this paragraph, cold or hot holding equipment used for potentially hazardous food shall be designed to include and shall be equipped with at least one integral or permanently affixed temperature measuring device that is located to allow easy viewing of the device's temperature display.

(C) Subparagraph (B) of this paragraph does not apply to equipment for which the placement of a temperature measuring device is not a practical means for measuring the ambient air surrounding the food because of the design, type, and use of the equipment, such as calrod units, heat lamps, cold plates, bainmaries, steam tables, insulated food transport containers, and salad bars.

(D) Temperature measuring devices shall be designed to be easily readable.

(E) Food temperature measuring device and water temperature measuring device on warewashing machines shall have a numerical scale, printed record, or digital readout in increments no greater than 1 degrees Celsius or 2 degrees Fahrenheit in the intended range of use.

(13) Warewashing machine, data plate operating specifications. A warewashing machine shall be provided with an easily accessible and readable data plate affixed to the machine by the manufacturer that indicates the machine's design and operating specifications including the:

(A) temperatures required for washing, rinsing, and sanitizing;

(B) pressure required for the fresh water sanitizing rinse unless the machine is designed to use only a pumped sanitizing rinse; and

(C) conveyor speed for conveyor machines or cycle time for stationary rack machines.

(14) Warewashing machines, internal baffles. Warewashing machine wash and rinse tanks shall be equipped with baffles, curtains, or other means to minimize internal cross contamination of the solutions in wash and rinse tanks.

(15) Warewashing machines, temperature measuring devices. A warewashing machine shall be equipped with a temperature measuring device that indicates the temperature of the water:

(A) in each wash and rinse tank; and

(B) as the water enters the hot water sanitizing final rinse manifold or in the chemical sanitizing solution tank.

(16) Manual warewashing equipment, heaters and baskets. If hot water is used for sanitization in manual warewashing operations, the sanitizing compartment of the sink shall be:

(A) designed with an integral heating device that is capable of maintaining water at a temperature not less than 77 degrees Celsius (171 degrees Fahrenheit); and

(B) provided with a rack or basket to allow complete immersion of equipment and utensils into the hot water.

(17) Warewashing machines, automatic dispensing of detergents and sanitizers. A warewashing machine that is installed after adoption of these rules by the regulatory authority, shall be equipped to:

(A) automatically dispense detergents and sanitizers; and

(B) incorporate a visual means to verify that detergents and sanitizers are delivered or a visual or audible alarm to signal if the detergents and sanitizers are not delivered to the respective washing and sanitizing cycles.

(18) Warewashing machines, flow pressure device.

(A) Warewashing machines that provide a fresh hot water sanitizing rinse shall be equipped with a pressure gauge or similar device such as a transducer that measures and displays the water pressure in the supply line immediately before entering the warewashing machine.

(B) If the flow pressure measuring device is upstream of the fresh hot water sanitizing rinse control valve, the device shall be mounted in a 6.4 millimeter or one-fourth inch Iron Pipe Size (IPS) valve.

(C) Subparagraphs (A) and (B) of this paragraph do not apply to a machine that uses only a pumped or recirculated sanitizing rinse.

(19) Warewashing sinks and drainboards, self-draining. Sinks and drainboards of warewashing sinks and machines shall be self-draining.

(20) Equipment compartments, drainage. Equipment compartments that are subject to accumulation of moisture due to conditions such as condensation, food or beverage drip, or water from melting ice shall be sloped to an outlet that allows complete draining.

(21) Vending machines, liquid waste products.

(A) Vending machines designed to store beverages that are packaged in containers made from paper products shall be equipped with diversion devices and retention pans or drains for container leakage.

(B) Vending machines that dispense liquid food in bulk shall be:

(i) provided with an internally mounted waste receptacle for the collection of drip, spillage, overflow, or other internal wastes; and

(ii) equipped with an automatic shutoff device that will place the machine out of operation before the waste receptacle overflows.

(C) Shutoff devices specified under subparagraph (B)(ii) of this paragraph shall prevent water or liquid food from continuously running if there is a failure of a flow control device in the water or liquid food system or waste accumulation that could lead to overflow of the waste receptacle.

(22) Case lot handling equipment, moveability. Equipment, such as dollies, pallets, racks, and skids used to store and transport large quantities of packaged foods received from a supplier in a cased or overwrapped lot, shall be designed to be moved by hand or by conveniently available equipment such as hand trucks and forklifts.

(23) Vending machine doors and openings.

(A) Vending machine doors and access opening covers to food and container storage spaces shall be tight-fitting so that the space along the entire interface between the doors or covers and the cabinet of the machine, if the doors or covers are in a closed position, is no greater than 1.5 millimeters or one-sixteenth inch by:

(i) being covered with louvers, screens, or materials that provide an equivalent opening of not greater than 1.5 millimeters or one-sixteenth inch. Screening of 12 or more mesh to 2.5 centimeters (12 mesh to 1 inch) meets this requirement;

(ii) being effectively gasketed;

(iii) having interface surfaces that are at least 13 millimeters or one-half inch wide; or

(iv) jambs or surfaces used to form an L-shaped entry path to the interface.

(B) Vending machine service connection openings through an exterior wall of a machine shall be closed by sealants, clamps, or grommets so that the openings are no larger than 1.5 millimeters or one-sixteenth inch.

(24) Food equipment certification, classification, acceptability. Food equipment that is certified or classified for sanitation by an American National Standards Institute (ANSI)-accredited certification program will be deemed to comply with subsections (a) - (f) of this section.

(g) Equipment, numbers and capacities.

(1) Cooling, heating, and holding capacities. Equipment for cooling and heating food, and holding cold and hot food, shall be sufficient in number and capacity to provide food temperatures as specified under §229.164 of this title.

(2) Manual warewashing, sink compartment requirements.

(A) Except as specified in subparagraph (C) of this paragraph, a sink with at least three compartments shall be provided for manually washing, rinsing, and sanitizing equipment and utensils.

(B) Sink compartments shall be large enough to accommodate immersion of the largest equipment and utensils. If equipment or utensils are too large for the warewashing sink, a warewashing machine or alternative equipment as specified in subparagraph (C) of this paragraph shall be used.

(C) Alternative manual warewashing equipment may be used when there are special cleaning needs or constraints and its use is approved. Alternative manual warewashing equipment may include:

(i) high-pressure detergent sprayers;

(ii) low- or line-pressure spray detergent foamers;

(iii) other task-specific cleaning equipment;

(iv) brushes or other implements;

(v) two-compartment sinks as specified under subparagraphs (D) and (E) of this paragraph; or

(vi) receptacles that substitute for the compartments of a multicompartment sink.

(D) Before a two-compartment sink is used:

(i) it must be approved by the regulatory authority; and

(ii) the permit holder shall limit the number of kitchenware items cleaned and sanitized in the two-compartment sink, and shall limit warewashing to batch operations for cleaning kitchenware such as between cutting one type of raw meat and another or cleanup at the end of a shift, and shall:

(I) make up the cleaning and sanitizing solutions immediately before use and drain them immediately after use; and

(II) use a detergent-sanitizer to sanitize and apply the detergent-sanitizer in accordance with the manufacturer's label instructions and as specified under subsection (k)(15) of this section; or

(III) use a hot water sanitization immersion step as specified under subsection (o)(6)(C) of this section.

(E) A two-compartment sink may not be used for warewashing operations where cleaning and sanitizing solutions are used for a continuous or intermittent flow of kitchenware or tableware in an ongoing warewashing process.

(3) Drainboards. Drainboards, utensil racks, or tables large enough to accommodate all soiled and cleaned items that may accumulate during hours of operation shall be provided for necessary utensil holding before cleaning and after sanitizing.

(4) Ventilation hood systems, adequacy. Ventilation hood systems and devices shall be sufficient in number and capacity to prevent grease or condensation from collecting on walls and ceilings.

(5) Clothes washers and dryers.

(A) Except as specified in subparagraph (B) of this paragraph, if work clothes or linens are laundered on the premises, a mechanical clothes washer and dryer shall be provided and used.

(B) If on-premises laundering is limited to wiping cloths intended to be used moist, or wiping cloths are air-dried as specified under subsection (n)(2) of this section, a mechanical clothes washer and dryer need not be provided.

(h) Utensils, temperature measuring devices, and testing devices.

(1) Utensils, consumer self-service. A food dispensing utensil shall be available for each container displayed at a consumer self-service unit such as a buffet or salad bar.

(2) Food temperature measuring devices. Food temperature measuring device shall be provided and readily accessible for use in ensuring attainment and maintenance of food temperatures as specified under §229.164 of this title.

(3) A temperature measuring device with a suitable small-diameter probe that is designed to measure the temperature of thin masses shall be provided and readily accessible to accurately measure the temperature in thin foods such as meat patties and fish filets.

(4) Temperature measuring devices, manual warewashing. In manual warewashing operations, a temperature measuring device shall be provided and readily accessible for frequently measuring the washing and sanitizing temperatures.

(5) Sanitizing solutions, testing devices. A test kit or other device that accurately measures the concentration in mg/L of sanitizing solutions shall be provided.

(i) Location of equipment, clothes washers and dryers, and storage cabinets.

(1) Except as specified in paragraph (2) of this subsection, equipment, a cabinet used for the storage of food, or a cabinet that is used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be located:

(A) in locker rooms;

(B) in toilet rooms;

(C) in garbage rooms;

(D) in mechanical rooms;

(E) under sewer lines that are not shielded to intercept potential drips;

(F) under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;

(G) under open stairwells; or

(H) under other sources of contamination.

(2) Linen, single-service, single-use item exception. A storage cabinet used for linens or single-service or single-use articles may be stored in a locker room.

(3) Clothes washer and dryer location requirements. If a mechanical clothes washer or dryer is provided, it shall be located so that the washer or dryer is protected from contamination and only where there is no exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(j) Installation, fixed equipment.

(1) Fixed equipment, spacing or sealing.

(A) Equipment that is fixed because it is not easily movable shall be installed so that it is:

(i) spaced to allow access for cleaning along the sides, behind, and above the equipment;

(ii) spaced from adjoining equipment, walls, and ceilings a distance of not more than one millimeter or one thirty-second inch; or

(iii) sealed to adjoining equipment or walls, if the equipment is exposed to spillage or seepage.

(B) Table-mounted equipment that is not easily movable shall be installed to allow cleaning of the equipment and areas underneath and around the equipment by being:

(i) sealed to the table; or

(ii) elevated on legs as specified under paragraph (2)(D) of this subsection.

(2) Fixed equipment, elevation or sealing.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, floor-mounted equipment that is not easily movable shall be sealed to the floor or elevated on legs that provide at least a 15-centimeter (6-inch) clearance between the floor and the equipment.

(B) If no part of the floor under the floor-mounted equipment is more than 15 centimeters (6 inches) from the point of cleaning access, the clearance space may be only 10 centimeters (4 inches).

(C) This section does not apply to display shelving units, display refrigeration units, and display freezer units located in the consumer shopping areas of a retail food store, if the floor under the units is maintained clean.

(D) Except as specified in subparagraph (E) of this paragraph, table-mounted equipment that is not easily movable shall be elevated on legs that provide at least a 10-centimeter (4-inch) clearance between the table and the equipment.

(E) The clearance space between the table and table-mounted equipment may be:

(i) 7.5 centimeters (3 inches) if the horizontal distance of the table top under the equipment is no more than 50 centimeters (20 inches) from the point of access for cleaning; or

(ii) 5 centimeters (2 inches) if the horizontal distance of the table top under the equipment is no more than 7.5 centimeters (3 inches) from the point of access for cleaning.

(k) Equipment, maintenance and operation.

(1) Good repair and proper adjustment.

(A) Equipment shall be maintained in a state of repair and condition that meets the requirements specified under subsections (a) and (b) of this section.

(B) Equipment components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight, and adjusted in accordance with manufacturer's specifications.

(C) Cutting or piercing parts of can openers shall be kept sharp to minimize the creation of metal fragments that can contaminate food when the container is opened.

(2) Cutting surfaces. Surfaces such as cutting blocks and boards that are subject to scratching and scoring shall be resurfaced if they can no longer be effectively cleaned and sanitized, or discarded if they are not capable of being resurfaced.

(3) Microwave ovens. Microwave ovens shall meet the safety standards specified in 21 CFR §1030.10, Microwave Ovens.

(4) Warewashing equipment, cleaning frequency. A warewashing machine; the compartments of sinks, basins, or other receptacles used for washing and rinsing equipment, utensils, or raw foods, or laundering wiping cloths; and drainboards or other equipment used to substitute for drainboards as specified under subsection (g)(3) of this section shall be cleaned:

(A) before use;

(B) throughout the day at a frequency necessary to prevent recontamination of equipment and utensils and to ensure that the equipment performs its intended function; and

(C) if used, at least every 24 hours.

(5) Warewashing machines, manufacturers' operating instructions.

(A) A warewashing machine and its auxiliary components shall be operated in accordance with the machine's data plate and other manufacturer's instructions.

(B) A warewashing machine's conveyor speed or automatic cycle times shall be maintained accurately timed in accordance with manufacturer's specifications.

(6) Warewashing sinks, use limitation.

(A) A warewashing sink may not be used for handwashing as specified under §229.163(i) of this title (relating to Management and Personnel) or dumping mop water.

(B) If a warewashing sink is used to wash wiping cloths, wash produce, or thaw food, the sink shall be cleaned as specified under paragraph (4) of this section before and after each time it is used to wash wiping cloths or wash produce or thaw food. Sinks used to wash or thaw food shall be sanitized as specified under subsections (p) - (r) of this section before and after using the sink to wash produce or thaw food.

(7) Warewashing equipment, cleaning agents. When used for warewashing, the wash compartment of a sink, mechanical warewasher, or wash receptacle of alternative manual warewashing equipment as specified in subsection (g)(2)(C) of this section, shall contain a wash solution of soap, detergent, acid cleaner, alkaline cleaner, degreaser, abrasive cleaner, or other cleaning agent according to the cleaning agent manufacturer's label instructions.

(8) Warewashing equipment, clean solutions. The wash, rinse, and sanitize solutions shall be maintained clean.

(9) Manual warewashing equipment, wash solution temperature. The temperature of the wash solution in manual warewashing equipment shall be maintained at not less than 43 degrees Celsius (110 degrees Fahrenheit) or the temperature specified on the cleaning agent manufacturer's label instructions.

(10) Mechanical warewashing equipment, wash solution temperature.

(A) The temperature of the wash solution in spray type warewashers that use hot water to sanitize may not be less than:

(i) for a stationary rack, single temperature machine, 74 degrees Celsius (165 degrees Fahrenheit);

(ii) for a stationary rack, dual temperature machine, 66 degrees Celsius (150 degrees Fahrenheit);

(iii) for a single tank, conveyor, dual temperature machine, 71 degrees Celsius (160 degrees Fahrenheit); or

(iv) for a multitank, conveyor, multitemperature machine, 66 degrees Celsius (150 degrees Fahrenheit).

(B) The temperature of the wash solution in spray-type warewashers that use chemicals to sanitize may not be less than 49 degrees Celsius (120 degrees Fahrenheit).

(11) Manual warewashing equipment, hot water sanitization temperatures. If immersion in hot water is used for sanitizing in a manual operation, the temperature of the water shall be maintained at 77 degrees Celsius (171 degrees Fahrenheit) or above.

(12) Mechanical warewashing equipment, hot water sanitization temperatures.

(A) Except as specified in subparagraph (B) of this paragraph, in a mechanical operation, the temperature of the fresh hot water sanitizing rinse as it enters the manifold may not be more than 90 degrees Celsius (194 degrees Fahrenheit), or less than:

(i) for a stationary rack, single temperature machine, 74 degrees Celsius (165 degrees Fahrenheit); or

(ii) for all other machines, 82 degrees Celsius (180 degrees Fahrenheit).

(B) The maximum temperature specified under subparagraph (A) of this paragraph, does not apply to the high pressure and temperature systems with wand-type, hand-held, spraying devices used for the in-place cleaning and sanitizing of equipment such as meat saws.

(13) Mechanical warewashing equipment, sanitization pressure. The flow pressure of the fresh hot water sanitizing rinse in a warewashing machine may not be less than 100 kilopascals (15 pounds per square inch) or more than 170 kilopascals (25 pounds per square inch) as measured in the water line immediately downstream or upstream from the fresh hot water sanitizing rinse control valve.

(14) Manual and mechanical warewashing equipment, chemical sanitization temperature, pH, concentration, and hardness. A chemical sanitizer used in a sanitizing solution for a manual or mechanical operation at exposure times specified under subsection (r)(3) of this section shall be listed in 21 CFR §178.1010, Sanitizing Solutions, shall be used in accordance with the EPA-approved manufacturer's label use instructions, and shall be used as follows:

(A) a chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart;
Figure: 25 TAC §229.165(k)(14)(A)

(B) an iodine solution shall have a:

(i) minimum temperature of 24 degrees Celsius (75 degrees Fahrenheit);

(ii) pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective; and

(iii) concentration between 12.5 mg/L and 25 mg/L;

(C) a quaternary ammonium compound solution shall:

(i) have a minimum temperature of 24 degrees Celsius (75 degrees Fahrenheit);

(ii) have a concentration as specified under §229.168(f)(1) of this title (relating to Poisonous or Toxic Materials) and as indicated by the manufacturer's use directions included in the labeling; and

(iii) be used only in water with 500 mg/L hardness or less or in water having a hardness no greater than specified by the manufacturer's label;

(D) if another solution of a chemical specified under subparagraphs (A) - (C) of this paragraph is used, the permit holder shall demonstrate to the regulatory authority that the solution achieves sanitization and the use of the solution shall be approved; or

(E) if a chemical sanitizer other than chlorine, iodine, or a quaternary ammonium compound is used, it shall be applied in accordance with the manufacturer's use directions included in the labeling.

(15) Manual warewashing equipment, chemical sanitization using detergent-sanitizers. If a detergent-sanitizer is used to sanitize in a cleaning and sanitizing procedure where there is no distinct water rinse between the washing and sanitizing steps, the agent applied in the sanitizing step shall be the same detergent-sanitizer that is used in the washing step.

(16) Warewashing equipment, determining chemical sanitizer concentration. Concentration of the sanitizing solution shall be accurately determined by using a test kit or other device.

(l) Utensils and temperature and pressure measuring devices.

(1) Good repair and calibration.

(A) Utensils shall be maintained in a state of repair or condition that complies with the requirements specified under subsections (a) - (f) of this section or shall be discarded.

(B) Food temperature measuring device shall be calibrated in accordance with manufacturer's specifications as necessary to ensure their accuracy.

(C) Ambient air temperature, water pressure, and water temperature measuring device shall be maintained in good repair and be accurate within the intended range of use.

(2) Single-service and single-use articles, required use. A food establishment without facilities specified under subsections (m) - (r) of this section for cleaning and sanitizing kitchenware and tableware shall provide only single-use kitchenware, single-service articles, and single-use articles for use by food employees and single-service articles for use by consumers.

(3) Single-service and single-use articles, use limitation.

(A) Single-service and single-use articles may not be reused.

(B) The bulk milk container dispensing tube shall be cut on the diagonal leaving no more than one inch protruding from the chilled dispensing head.

(4) Shells, use limitation. Mollusk and crustacea shells may not be used more than once as serving containers.

(m) Cleaning of equipment and utensils.

(1) Equipment, food-contact surfaces, nonfood-contact surfaces, and utensils.

(A) Equipment food-contact surfaces and utensils shall be clean to sight and touch.

(B) The food-contact surfaces of cooking equipment and pans shall be kept free of encrusted grease deposits and other soil accumulations.

(2) Nonfood-contact surfaces of equipment shall be kept free of an accumulation of dust, dirt, food residue, and other debris.

(n) Frequency of cleaning.

(1) Equipment food-contact surfaces and utensils.

(A) Equipment food-contact surfaces and utensils shall be cleaned:

(i) except as specified in subparagraph (B) of this paragraph, before each use with a different type of raw animal food such as beef, fish, lamb, pork, or poultry;

(ii) each time there is a change from working with raw foods to working with ready-to-eat foods;

(iii) between uses with raw fruits and vegetables and with potentially hazardous food;

(iv) before using or storing a food temperature measuring device; and

(v) at any time during the operation when contamination may have occurred.

(B) Subparagraph (A)(i) of this paragraph does not apply if the food-contact surface or utensil is in contact with a succession of different raw animal foods each requiring a higher cooking temperature as specified under §229.164(k)(1)(A)(iii) of this title than the previous food, such as preparing raw fish followed by cutting raw poultry on the same cutting board.

(C) Except as specified in subparagraph (D) of this paragraph, if used with potentially hazardous food, equipment food-contact surfaces and utensils shall be cleaned throughout the day at least every four hours.

(D) Surfaces of utensils and equipment contacting potentially hazardous food may be cleaned less frequently than every four hours if:

(i) in storage, containers of potentially hazardous food and their contents are maintained at temperatures specified under §229.164 of this title and the containers are cleaned when they are empty;

(ii) utensils and equipment are used to prepare food in a refrigerated room or area that is maintained at one of the temperatures in the following chart and:

(I) the utensils and equipment are cleaned at the frequency in the following chart that corresponds to the temperature; and

Figure: 25 TAC §229.165(n)(1)(D)(ii)(I)

(II) the cleaning frequency based on the ambient temperature of the refrigerated room or area is documented in the food establishment;

(iii) containers in serving situations such as salad bars, delis, and cafeteria lines hold ready-to-eat potentially hazardous food that is maintained at the temperatures specified under §229.164 of this title, are intermittently combined with additional supplies of the same food that is at the required temperature, and the containers are cleaned at least every 24 hours;

(iv) temperature measuring devices are maintained in contact with food, such as when left in a container of deli food or in a roast, held at temperatures specified under §229.164 of this title;

(v) equipment is used for storage of packaged or unpackaged food such as a reach-in refrigerator and the equipment is cleaned at a frequency necessary to preclude accumulation of soil residues;

(vi) the cleaning schedule is approved based on consideration of:

(I) the characteristics of the equipment and its use;

(II) the type of food involved;

(III) the amount of food residue accumulation; and

(IV) the temperature at which the food is maintained during the operation and the potential for the rapid and progressive multiplication of pathogenic or toxigenic microorganisms that are capable of causing foodborne disease; or

(vii) in-use utensils are intermittently stored in a container of water in which the water is maintained at 57 degrees Celsius (135 degrees Fahrenheit) or more and the utensils and container are cleaned at least every 24 hours or at a frequency necessary to preclude accumulation of soil residues.

(E) Except when dry cleaning methods are used as specified under subsection (o)(1) of this section, surfaces of utensils and equipment contacting food that is not potentially hazardous shall be cleaned:

(i) at any time when contamination may have occurred;

(ii) at least every 24 hours for iced tea dispensers and consumer self-service utensils such as tongs, scoops, or ladles;

(iii) before restocking consumer self-service equipment and utensils such as condiment dispensers and display containers; and

(iv) in equipment such as ice bins and beverage dispensing nozzles and enclosed components of equipment such as ice makers, cooking oil storage tanks and distribution lines, beverage and syrup dispensing lines or tubes, coffee bean grinders, and water vending equipment:

(I) at a frequency specified by the manufacturer; or

(II) absent manufacturer specifications, at a frequency necessary to preclude accumulation of soil or mold.

(2) Cooking and baking equipment.

(A) The food-contact surfaces of cooking and baking equipment shall be cleaned at least every 24 hours. This section does not apply to hot oil cooking and filtering equipment if it is cleaned as specified in paragraph (1)(D)(vi) of this subsection.

(B) The cavities and door seals of microwave ovens shall be cleaned at least every 24 hours by using the manufacturer's recommended cleaning procedure.

(3) Nonfood-contact surfaces. Nonfood-contact surfaces of equipment shall be cleaned at a frequency necessary to preclude accumulation of soil residues.

(o) Methods of cleaning.

(1) Dry cleaning.

(A) If used, dry cleaning methods such as brushing, scraping, and vacuuming shall contact only surfaces that are soiled with dry food residues that are not potentially hazardous.

(B) Cleaning equipment used in dry cleaning food-contact surfaces may not be used for any other purpose.

(2) Precleaning.

(A) Food debris on equipment and utensils shall be scrapped over a waste disposal unit or garbage receptacle or shall be removed in a warewashing machine with a prewash cycle.

(B) If necessary for effective cleaning, utensils and equipment shall be preflushed, presoaked, or scrubbed with abrasives.

(3) Loading of soiled items, warewashing machines. Soiled items to be cleaned in a warewashing machine shall be loaded into racks, trays, or baskets or onto conveyors in a position that:

(A) exposes the items to the unobstructed spray from all cycles; and

(B) allows the items to drain.

(4) Wet cleaning.

(A) Equipment food-contact surfaces and utensils shall be effectively washed to remove or completely loosen soils by using the manual or mechanical means necessary such as the application of detergents containing wetting agents and emulsifiers; acid, alkaline, or abrasive cleaners; hot water; brushes; scouring pads; high-pressure sprays; or ultrasonic devices.

(B) The washing procedures selected shall be based on the type and purpose of the equipment or utensil, and on the type of soil to be removed.

(5) Washing, procedures for alternative manual warewashing equipment. If washing in sink compartments or a warewashing machine is impractical such as when the equipment is fixed or the utensils are too large, washing shall be done by using alternative manual warewashing equipment as specified in subsection (g)(2)(C) of this section in accordance with the following procedures:

(A) equipment shall be disassembled as necessary to allow access of the detergent solution to all parts;

(B) equipment components and utensils shall be scrapped or rough cleaned to remove food particle accumulation; and

(C) equipment and utensils shall be washed as specified under paragraph (4)(A) of this subsection.

(6) Rinsing procedures. Washed utensils and equipment shall be rinsed so that abrasives are removed and cleaning chemicals are removed or diluted through the use of water or a detergent-sanitizer solution by using one of the following procedures:

(A) use of a distinct, separate water rinse after washing and before sanitizing if using:

(i) a three-compartment sink;

(ii) alternative manual warewashing equipment equivalent to a three-compartment sink as specified in subsection (g)(2)(C) of this section; or

(iii) a three-step washing, rinsing, and sanitizing procedure in a warewashing system for CIP equipment;

(B) use of a detergent-sanitizer as specified under subsection (k)(15) of this section if using:

(i) alternative warewashing equipment as specified in subsection (g)(2)(C) of this section that is approved for use with a detergent-sanitizer; or

(ii) a warewashing system for CIP equipment;

(C) use of a nondistinct water rinse that is integrated in the hot water sanitization immersion step of a two-compartment sink operation;

(D) if using a warewashing machine that does not recycle the sanitizing solution as specified under subparagraph (E) of this paragraph, or alternative manual warewashing equipment such as sprayers, use of a nondistinct water rinse that is:

(i) integrated in the application of the sanitizing solution; and

(ii) washed immediately after each application; or

(E) if using a warewashing machine that recycles the sanitizing solution for use in the next wash cycle, use of a nondistinct water rinse that is integrated in the application of the sanitizing solution.

(7) Returnables, cleaning for refilling.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, returned empty containers intended for cleaning and refilling with food shall be cleaned and refilled in a regulated food processing plant.

(B) A food-specific container for beverages may be refilled at a food establishment if:

(i) only a beverage that is not a potentially hazardous food is used as specified under §229.164(h)(7)(A) of this title;

(ii) the design of the container and of the rinsing equipment and the nature of the beverage, when considered together, allow effective cleaning at home or in the food establishment;

(iii) facilities for rinsing before refilling returned containers with fresh, hot water that is under pressure and not recirculated are provided as part of the dispensing system;

(iv) the consumer-owned container returned to the food establishment for refilling is refilled for sale or service only to the same consumer; and

(v) the container is refilled by:

(I) an employee of the food establishment; or

(II) the owner of the container if the beverage system includes a contamination-free transfer process that can not be bypassed by the container owner.

(C) Consumer-owned containers that are not food-specific may be filled at a water vending machine or system.

(p) Sanitization, food-contact surfaces and utensils. Equipment food-contact surfaces and utensils shall be sanitized.

(q) Sanitization frequency before use after cleaning. Utensils and food-contact surfaces of equipment shall be sanitized before use after cleaning.

(r) Sanitization methods, hot water and chemical. After being cleaned, equipment food-contact surfaces and utensils shall be sanitized in:

(1) hot water manual operations by immersion for at least 30 seconds and as specified under subsection (k)(11) of this section;

(2) hot water mechanical operations by being cycled through equipment that is set up as specified under subsection (k)(5), (12) and (13) of this section and achieving a utensil surface temperature of 71 degrees Celsius (160 degrees Fahrenheit) as measured by an irreversible registering temperature indicator; or

(3) chemical manual or mechanical operations, including the application of sanitizing chemicals by immersion, manual swabbing, brushing, or pressure spraying methods, using a solution as specified under subsection (k)(14) of this section by providing:

(A) except as specified under subparagraph (C) of this paragraph, an exposure time of at least 10 seconds for a chlorine solution specified under subsection (k)(14)(A) of this section;

(B) an exposure time of at least 7 seconds for a chlorine solution of 50 mg/L that has a pH of 10 or less and a temperature of at least 38 degrees Celsius (100 degrees Fahrenheit) or a pH of 8 or less and a temperature of at least 24 degrees Celsius (75 degrees Fahrenheit);

(C) An exposure time of at least 30 seconds for other chemical sanitizing solutions; or

(D) An exposure time used in relationship with a combination of temperature, concentration, and pH that, when evaluated for efficacy, yields sanitization as defined in §229.162(91) of this title (relating to Definitions).

(s) Laundering, clean linens. Clean linens shall be free from food residues and other soiling matter.

(t) Laundering, frequency.

(1) Linens that do not come in direct contact with food shall be laundered between operations if they become wet, sticky, or visibly soiled.

(2) Cloth gloves used as specified in §229.164(h)(5)(D) of this title shall be laundered before being used with a different type of raw animal food such as beef, lamb, pork, and fish.

(3) Linens and napkins that are used as specified under §229.164(h)(4) of this title and cloth napkins shall be laundered between each use.

(4) Wet wiping cloths shall be laundered daily.

(5) Dry wiping cloths shall be laundered as necessary to prevent contamination of food and clean serving utensils.

(u) Laundering, methods.

(1) Storage of soiled linens. Soiled linens shall be kept in clean, nonabsorbent receptacles or clean, washable laundry bags and stored and transported to prevent contamination of food, clean equipment, clean utensils, and single-service and single-use articles.

(2) Mechanical washing.

(A) Except as specified in subparagraph (B) of this paragraph, linens shall be mechanically washed.

(B) In food establishments in which only wiping cloths are laundered as specified in subsection (g)(5)(B) of this section, the wiping cloths may be laundered in a mechanical washer, sink designated only for laundering wiping cloths, or a warewashing or food preparation sink that is cleaned as specified under subsection (k)(14) of this section.

(3) Use of laundry facilities.

(A) Except as specified in subparagraph (B) of this paragraph, laundry facilities on the premises of a food establishment shall be used only for the washing and drying of items used in the operation of the establishment.

(B) Separate laundry facilities located on the premises for the purpose of general laundering such as for institutions providing boarding and lodging may also be used for laundering food establishment items.

(v) Drying, equipment and utensils.

(1) Equipment and utensils, air-drying required. After cleaning and sanitizing, equipment and utensils:

(A) shall be air-dried or used after adequate draining as specified in paragraph (a) of 21 CFR §178.1010, Sanitizing Solutions, before contact with food; and

(B) may not be cloth dried except that utensils that have been air-dried may be polished with cloths that are maintained clean and dry.

(2) Wiping cloths, air-drying locations. Wiping cloths laundered in a food establishment that does not have a mechanical clothes dryer as specified in subsection (g)(5)(B) of this section shall be air-dried in a location and in a manner that prevents contamination of food, equipment, utensils, linens, and single-service and single-use articles and the wiping cloths. This section does not apply if wiping cloths are stored after laundering in a sanitizing solution as specified under subsection (k)(14) of this section.

(w) Lubricating and reassembling of food-contact surfaces, equipment.

(1) Food-contact surfaces. Lubricants shall be applied to food-contact surfaces that require lubrication in a manner that does not contaminate food-contact surfaces.

(2) Equipment. Equipment shall be reassembled so that food-contact surfaces are not contaminated.

(x) Storage.

(1) Equipment, utensils, linens, and single-service and single-use articles.

(A) Except as specified in subparagraph (D) of this paragraph, cleaned equipment and utensils, laundered linens, and single-service and single-use articles shall be stored:

(i) in a clean, dry location;

(ii) where they are not exposed to splash, dust, or other contamination; and

(iii) at least 15 cm (6 inches) above the floor.

(B) Clean equipment and utensils shall be stored as specified under subparagraph (A) of this paragraph and shall be stored:

(i) in a self-draining position that allows air drying; and

(ii) covered or inverted.

(C) Single-service and single-use articles shall be stored as specified under subparagraph (A) of this paragraph and shall be kept in the original protective package or stored by using other means that afford protection from contamination until used.

(D) Items that are kept in closed packages may be stored less than 15 cm (6 inches) above the floor on dollies, pallets, racks, and skids that are designed as specified under subsection (f)(22) of this section.

(2) Storage prohibitions.

(A) Except as specified in subparagraph (B) of this paragraph, cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be stored:

(i) in locker rooms;

(ii) in toilet rooms;

(iii) in garbage rooms;

(iv) in mechanical rooms;

(v) under sewer lines that are not shielded to intercept potential drips;

(vi) under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;

(vii) under open stairwells; or

(viii) under other sources of contamination.

(B) Laundered linens and single-service and single-use articles that are packaged or in a facility such as a cabinet may be stored in a locker room.

(y) Handling of utensils, single service articles.

(1) Kitchenware and tableware.

(A) Single-service and single-use articles and cleaned and sanitized utensils shall be handled, displayed, and dispensed so that contamination of food- and lip-contact surfaces is prevented.

(B) Knives, forks, and spoons that are not prewrapped shall be presented so that only the handles are touched by employees and by consumers if consumer self-service is provided.

(C) Except as specified under subparagraph (B) of this paragraph, single-service articles that are intended for food- or lip-contact shall be furnished for consumer self-service with the original individual wrapper intact or from an approved dispenser.

(2) Soiled and clean tableware. Soiled tableware shall be removed from consumer eating and drinking areas and handled so that clean tableware is not contaminated.

(3) Preset tableware. If tableware is preset:

(A) it shall be protected from contamination by being wrapped, covered, or inverted;

(B) exposed, unused settings shall be removed when a consumer is seated; or

(C) exposed, unused settings shall be cleaned and sanitized before further use if the settings are not removed when a consumer is seated.

§229.166. Water, Plumbing, and Waste.

(a) Source.

(1) Approved system. Drinking water shall be obtained from an approved source that is:

(A) a public water system; or

(B) a nonpublic water system that is constructed, maintained, and operated according to law.

(2) System flushing and disinfection. A drinking water system shall be flushed and disinfected before being placed in service after construction, repair, or modification and after an emergency situation, such as a flood, that may introduce contaminants to the system.

(3) Bottled drinking water. Bottled drinking water used or sold in a food establishment shall be obtained from approved sources in accordance with 21 CFR 129 - Processing and Bottling of Bottled Drinking Water.

(b) Water quality standards.

(1) Public and private water systems. Except as specified under §229.166(b)(2):

(A) Water from a public water system shall meet 40 CFR 141 - National Primary Drinking Water Regulations, and state drinking water quality standards in accordance with 30 TAC §§290.101 - 290.114, 290.117 - 290.119, 290.121, and 290.122 (Drinking Water Standards Governing Drinking Water Quality and Reporting Requirement for Public Water Systems); and

(B) Water from a nonpublic water system shall meet state drinking water quality standards.

(2) Nondrinking water.

(A) A nondrinking water supply shall be used only if its use is approved by the regulatory authority.

(B) Nondrinking water shall be used only for nonculinary purposes such as air conditioning, nonfood equipment cooling, fire protection, and irrigation.

(3) Sampling. Except when used as specified under paragraph (2) of this subsection, water from a nonpublic water system shall be sampled and tested at least annually and as required by state water quality regulations.

(4) Sample report. The most recent sample report for the nonpublic water system shall be retained on file in the food establishment or the report shall be maintained as specified by state water quality regulations.

(c) Water quantity and availability.

(1) Capacity. The water source and system shall be of sufficient capacity to meet the peak water demands of the food establishment.

(2) Pressure. Water under pressure shall be provided to all fixtures, equipment, and nonfood equipment that are required to use water except that water supplied as specified under subsection (d)(2)(A) and (B) of this section to a temporary food establishment or in response to a temporary interruption of a water supply need not be under pressure.

(3) Hot water. Hot water generation and distribution systems shall be sufficient to meet the peak hot water demands throughout the food establishment.

(d) Water distribution, delivery, and retention systems.

(1) Distribution. Water shall be received from the source through the use of:

(A) an approved public water main; or

(B) one or more of the following that shall be constructed, maintained, and operated according to law:

(i) nonpublic water main, water pumps, pipes, hoses, connections, and other appurtenances;

(ii) water transport vehicles; and

(iii) water containers.

(2) Alternative water supply. Water meeting the requirements specified under subsections (a) - (c) of this section shall be made available for a mobile facility, for a temporary food establishment without a permanent water supply, and for a food establishment with a temporary interruption of its water supply through:

(A) a supply of containers of commercially bottled drinking water;

(B) one or more closed portable water containers;

(C) an enclosed vehicular water tank;

(D) an on-premises water storage tank; or

(E) piping, tubing, or hoses connected to an adjacent approved source.

(e) Plumbing systems, approved materials.

(1) Construction. A plumbing system and hoses conveying water shall be constructed and repaired with approved materials according to law.

(2) Water filter. A water filter shall be made of safe materials.

(f) Plumbing design, construction, and installation.

(1) Approved system and cleanable fixtures.

(A) A plumbing system shall be designed, constructed, and installed according to law.

(B) A plumbing fixture such as a handwashing facility, toilet, or urinal shall be easily cleanable.

(2) Handwashing facility, installation.

(A) A handwashing lavatory shall be equipped to provide water at a temperature of at least 38 degrees Celsius (100 degrees Fahrenheit) through a mixing valve or combination faucet.

(B) A steam mixing valve may not be used at a handwashing lavatory.

(C) A self-closing, slow-closing, or metering faucet shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.

(3) An automatic handwashing facility shall be installed in accordance with manufacturer's instructions.

(4) Backflow prevention, air gap. An air gap between the water supply inlet and the flood level rim of the plumbing fixture, equipment, or nonfood equipment shall be at least twice the diameter of the water supply inlet and may not be less than 25 mm (1 inch).

(5) Backflow prevention device, design standard. A backflow or backsiphonage prevention device installed on a water supply system shall meet American Society of Sanitary Engineering (ASSE) standards for construction, installation, maintenance, inspection, and testing for that specific application and type of device.

(6) Conditioning device, design. A water filter, screen, and other water conditioning device installed on water lines shall be designed to facilitate disassembly for periodic servicing and cleaning. A water filter element shall be of the replaceable type.

(g) Plumbing, numbers and capacities.

(1) Handwashing facilities.

(A) Except as specified in subparagraph (B) of this paragraph, at least one handwashing lavatory, a number of handwashing lavatories necessary for their convenient use by employees in areas specified under subsection (h)(1) of this section, and not fewer than the number of handwashing lavatories required by law shall be provided.

(B) If approved and capable of removing the types of soils encountered in the food operations involved, automatic handwashing facilities may be substituted for handwashing lavatories in a food establishment that has at least one handwashing lavatory.

(2) Toilets and urinals. At least one toilet and not fewer than the toilets required by law shall be provided. If authorized by law and urinals are substituted for toilets, the substitution shall be done as specified in law.

(3) Service sink. At least one service sink or one curbed cleaning facility equipped with a floor drain shall be provided and conveniently located for the cleaning of mops or similar wet floor cleaning tools and for the disposal of mop water and similar liquid waste.

(4) Backflow prevention device, when required. A plumbing system shall be installed to preclude backflow of a solid, liquid, or gas contaminant into the water supply system at each point of use at the food establishment, including on a hose bibb if a hose is attached or on a hose bibb if a hose is not attached and backflow prevention is required by law, by:

(A) providing an air gap as specified under subsection (f)(4) of this section; or

(B) installing an approved backflow prevention device as specified under subsection (f)(5) of this section.

(5) Backflow prevention device, carbonator.

(A) If not provided with an air gap as specified under subsection (f)(4) of this section, a double check valve with an intermediate vent preceded by a screen of not less than 100 mesh to 25.4mm (100 mesh to 1 inch) shall be installed upstream from a carbonating device and downstream from any copper in the water supply line.

(B) A single or double check valve attached to the carbonator need not be of the vented type if an air gap or vented backflow prevention device has been otherwise provided as specified under subparagraph (A) of this paragraph.

(h) Plumbing, location and placement.

(1) Handwashing facilities. A handwashing facility shall be located:

(A) to allow convenient use by employees in food preparation, food dispensing, and warewashing areas; and

(B) in, or immediately adjacent to, toilet rooms.

(2) Backflow prevention device, location. A backflow prevention device shall be located so that it may be serviced and maintained.

(3) Conditioning device, location. A water filter, screen, and other water conditioning device installed on water lines shall be located to facilitate disassembly for periodic servicing and cleaning.

(i) Plumbing, operation and maintenance.

(1) Using a handwashing facility.

(A) A handwashing facility shall be maintained so that it is accessible at all times for employee use.

(B) A handwashing facility may not be used for purposes other than handwashing.

(C) An automatic handwashing facility shall be used in accordance with manufacturer's instructions.

(2) Prohibiting a cross connection.

(A) Except as specified in 9 CFR §308.3(d), and 30 TAC §290.44(h) for firefighting, a person may not create a cross connection by connecting a pipe or conduit between the drinking water system and a nondrinking water system or a water system of unknown quality.

(B) The piping of a nondrinking water system shall be durably identified so that it is readily distinguishable from piping that carries drinking water.

(3) Scheduling inspection and service for a water system device. A device such as a water treatment device or backflow preventer shall be scheduled for inspection and service, in accordance with manufacturer's instructions and as necessary to prevent device failure based on local water conditions, and records demonstrating inspection and service shall be maintained by the person in charge.

(4) Water reservoir of fogging devices, cleaning.

(A) A reservoir that is used to supply water to a device such as a produce fogger shall be:

(i) maintained in accordance with manufacturer's specifications; and

(ii) cleaned in accordance with manufacturer's specifications or according to the procedures specified under subparagraph (B) of this paragraph, whichever is more stringent.

(B) Cleaning procedures shall include at least the following steps and shall be conducted at least once a week:

(i) draining and complete disassembly of the water and aerosol contact parts;

(ii) brush-cleaning the reservoir, aerosol tubing, and discharge nozzles with a suitable detergent solution;

(iii) flushing the complete system with water to remove the detergent solution and particulate accumulation; and

(iv) rinsing by immersing, spraying, or swabbing the reservoir, aerosol tubing, and discharge nozzles with at least 50 mg/L hypochlorite solution.

(5) System maintained in good repair. A plumbing system shall be:

(A) repaired according to law; and

(B) maintained in good repair.

(6) Mobile water tank and mobile food establishment water tank.

(A) Materials, approved. Materials that are used in the construction of a mobile water tank, mobile food establishment water tank, and appurtenances shall be:

(i) safe;

(ii) durable, corrosion-resistant, and nonabsorbent; and

(iii) finished to have a smooth, easily cleanable surface.

(B) Tank design and construction. A mobile water tank shall be:

(i) enclosed from the filling inlet to the discharge outlet; and

(ii) sloped to an outlet that allows complete drainage of the tank.

(C) Tank inspection and cleaning port, protected and secured. If a water tank is designed with an access port for inspection and cleaning, the opening shall be in the top of the tank and:

(i) flanged upward at least 13 mm (one-half inch); and

(ii) equipped with a port cover assembly that is:

(I) provided with a gasket and a device for securing the cover in place; and

(II) flanged to overlap the opening and sloped to drain.

(D) "V" type threads, use limitation. A fitting with "V" type threads on a water tank inlet or outlet shall be allowed only when a hose is permanently attached.

(E) Tank vent, protected. If provided, a water tank vent shall terminate in a downward direction and shall be covered with:

(i) 16 mesh to 25.4 mm (16 mesh to 1 inch) screen or equivalent when the vent is in a protected area; or

(ii) a protective filter when the vent is in an area that is not protected from windblown dirt and debris.

(F) Tank inlet and outlet, sloped to drain.

(i) A water tank and its inlet and outlet shall be sloped to drain.

(ii) A water tank inlet shall be positioned so that it is protected from contaminants such as waste discharge, road dust, oil, or grease.

(G) Tank hose, construction and identification. A hose used for conveying drinking water from a water tank shall be:

(i) safe;

(ii) durable, corrosion-resistant, and nonabsorbent;

(iii) resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition;

(iv) finished with a smooth interior surface; and

(v) clearly and durably identified as to its use if not permanently attached.

(H) Tank filter, compressed air. A filter that does not pass oil or oil vapors shall be installed in the air supply line between the compressor and drinking water system when compressed air is used to pressurize the water tank system.

(I) Protective cover or device. A cap and keeper chain, closed cabinet, closed storage tube, or other approved protective cover or device shall be provided for a water inlet, outlet, and hose.

(J) Mobile food establishment tank inlet. A mobile food establishment's water tank inlet shall be:

(i) 19.1 mm (three-fourths inch) in inner diameter or less; and

(ii) provided with a hose connection of a size or type that will prevent its use for any other service.

(K) Operation and maintenance, system flushing and disinfection. A water tank, pump, and hoses shall be flushed and sanitized before being placed in service after construction, repair, modification, and periods of nonuse.

(L) Using a pump and hoses, backflow prevention. A person shall operate a water tank, pump, and hoses so that backflow and other contamination of the water supply are prevented.

(M) Protecting inlet, outlet, and hose fitting. If not in use, a water tank and hose inlet and outlet fitting shall be protected using a cover or device as specified in subparagraph (I) of this paragraph.

(N) Tank, pump, and hoses, dedication.

(i) Except as specified in subparagraph (B) of this paragraph, a water tank, pump, and hoses used for conveying drinking water shall be used for no other purpose.

(ii) Water tanks, pumps, and hoses approved for liquid foods may be used for conveying drinking water if they are cleaned and sanitized before they are used to convey water.

(j) Sewage retention, drainage, and delivery.

(1) Food establishment drainage systems, including grease traps, that convey sewage shall be designed and installed as specified under subsection (f)(1)(A) of this section.

(2) Backflow prevention.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, a direct connection may not exist between the sewage system and a drain originating from equipment in which food, portable equipment, or utensils are placed.

(B) If allowed by law, a warewashing machine may have a direct connection between its waste outlet and a floor drain when the machine is located within 1.5 m (5 feet) of a trapped floor drain and the machine outlet is connected to the inlet side of a properly vented floor drain trap.

(C) If allowed by law, a warewashing or culinary sink may have a direct connection.

(3) Grease trap. If used, a grease trap shall be located to be easily accessible for cleaning, operation, and maintenance.

(4) Conveying sewage. Sewage shall be conveyed to the point of disposal through an approved sanitary sewage system or other system, including use of sewage transport vehicles, waste retention tanks, pumps, pipes, hoses, and connections that are constructed, maintained, and operated according to law.

(k) Disposal facility.

(1) Approved sewage disposal system. Sewage shall be disposed through an approved facility that is:

(A) a public sewage treatment plant; or

(B) an individual sewage disposal system that is sized, constructed, maintained, and operated according to law.

(2) Other liquid wastes and rainwater. Condensate drainage and other nonsewage liquids and rainwater shall be drained from point of discharge to disposal according to law.

(l) Storage facilities on the premises.

(1) Indoor storage area. If located within the food establishment, a storage area for refuse, recyclables, and returnables shall meet the requirements specified under §229.167(a), (c)(1) - (8), (d)(5) and (6) of this title (relating to Physical Facilities).

(2) Outdoor storage surface. An outdoor storage surface for refuse, recyclables, and returnables shall be constructed of nonabsorbent material such as concrete or asphalt and shall be smooth, durable, and sloped to drain.

(3) Outdoor enclosure. If used, an outdoor enclosure for refuse, recyclables, and returnables shall be constructed of durable and cleanable materials.

(4) Receptacles.

(A) Except as specified in subparagraph (B) of this paragraph, receptacles and waste handling units for refuse, recyclables, and returnables and for use with materials containing food residue shall be durable, cleanable, insect and rodent-resistant, leakproof, and nonabsorbent.

(B) Plastic bags and wet strength paper bags may be used to line receptacles for storage inside the food establishment, or within closed outside receptacles.

(5) Receptacles in vending machines. A refuse receptacle may not be located within a vending machine, except that a receptacle for beverage bottle crown closures may be located within a vending machine.

(6) Outside receptacles.

(A) Receptacles and waste handling units for refuse, recyclables, and returnables used with materials containing food residue and used outside the food establishment shall be designed and constructed to have tight-fitting lids, doors, or covers.

(B) Receptacles and waste handling units for refuse and recyclables such as an on-site compactor shall be installed so that accumulation of debris and insect and rodent attraction and harborage are minimized and effective cleaning is facilitated around and, if the unit is not installed flush with the base pad, under the unit.

(7) Storage areas, rooms, and receptacles, capacity and availability.

(A) An inside storage room and area and outside storage area and enclosure, and receptacles shall be of sufficient capacity to hold refuse, recyclables, and returnables that accumulate.

(B) A receptacle shall be provided in each area of the food establishment or premises where refuse is generated or commonly discarded, or where recyclables or returnables are placed.

(C) If disposable towels are used at handwashing lavatories, a waste receptacle shall be located at each lavatory or group of adjacent lavatories.

(8) Toilet room receptacle, covered. A toilet room used by females shall be provided with a covered receptacle for sanitary napkins.

(9) Cleaning implements and supplies.

(A) Except as specified in subparagraph (B) of this paragraph, suitable cleaning implements and supplies such as high pressure pumps, hot water, steam, and detergent shall be provided as necessary for effective cleaning of receptacles and waste handling units for refuse, recyclables, and returnables.

(B) If approved, off-premises-based cleaning services may be used if on-premises cleaning implements and supplies are not provided.

(10) Storage areas, redeeming machines, receptacles and waste handling units, location.

(A) An area designated for refuse, recyclables, returnables, and, except as specified in subparagraph (B) of this paragraph, a redeeming machine for recyclables or returnables shall be located so that it is separate from food, equipment, utensils, linens, and single-service and single-use articles and a public health hazard or nuisance is not created.

(B) A redeeming machine may be located in the packaged food storage area or consumer area of a food establishment if food, equipment, utensils, linens, and single-service and single-use articles are not subject to contamination from the machines and a public health hazard or nuisance is not created.

(C) The location of receptacles and waste handling units for refuse, recyclables, and returnables may not create a public health hazard or nuisance or interfere with the cleaning of adjacent space.

(11) Storing refuse, recyclables, and returnables. Refuse, recyclables, and returnables shall be stored in receptacles or waste handling units so that they are inaccessible to insects and rodents.

(12) Areas, enclosures, and receptacles, good repair. Storage areas, enclosures, and receptacles for refuse, recyclables, and returnables shall be maintained in good repair.

(13) Outside storage prohibitions.

(A) Except as specified in subparagraph (B) of this paragraph, refuse receptacles not meeting the requirements specified under subsection (l)(4)(A) of this section such as receptacles that are not rodent-resistant, unprotected plastic bags and paper bags, or baled units that contain materials with food residue may not be stored outside.

(B) Cardboard or other packaging material that does not contain food residues and that is awaiting regularly scheduled delivery to a recycling or disposal site may be stored outside without being in a covered receptacle if it is stored so that it does not create a rodent harborage problem.

(14) Covering receptacles. Receptacles and waste handling units for refuse, recyclables, and returnables shall be kept covered:

(A) inside the food establishment if the receptacles and units:

(i) contain food residue and are not in continuous use; or

(ii) after they are filled; and

(B) with tight-fitting lids or doors if kept outside the food establishment.

(15) Using drain plugs. Drains in receptacles and waste handling units for refuse, recyclables, and returnables shall have drain plugs in place.

(16) Maintaining refuse areas and enclosures. A storage area and enclosure for refuse, recyclables, or returnables shall be maintained free of unnecessary items, as specified under §229.167(p)(15) of this title, and clean.

(17) Cleaning receptacles.

(A) Receptacles and waste handling units for refuse, recyclables, and returnables shall be thoroughly cleaned in a way that does not contaminate food, equipment, utensils, linens, or single-service and single-use articles, and waste water shall be disposed of as specified under subsection (j)(4) of this section.

(B) Soiled receptacles and waste handling units for refuse, recyclables, and returnables shall be cleaned at a frequency necessary to prevent them from developing a buildup of soil or becoming attractants for insects and rodents.

(m) Refuse removal.

(1) Frequency. Refuse, recyclables, and returnables shall be removed from the premises at a frequency that will minimize the development of objectionable odors and other conditions that attract or harbor insects and rodents.

(2) Receptacles or vehicles. Refuse, recyclables, and returnables shall be removed from the premises by way of:

(A) portable receptacles that are constructed and maintained according to law; or

(B) a transport vehicle that is constructed, maintained, and operated according to law.

(n) Facilities for disposal and recycling, community or individual facility. Solid waste not disposed of through the sewage system such as through grinders and pulpers shall be recycled or disposed of in an approved public or private community recycling or refuse facility; or solid waste shall be disposed of in an individual refuse facility such as a landfill or incinerator which is sized, constructed, maintained, and operated according to law.

§229.167. Physical Facilities.

(a) Indoor areas, surface characteristics. Materials for indoor floor, wall, and ceiling surfaces under conditions of normal use shall be:

(1) smooth, durable, and easily cleanable for areas where food establishment operations are conducted;

(2) closely woven and easily cleanable carpet for carpeted areas; and

(3) nonabsorbent for areas subject to moisture such as food preparation areas, walk-in refrigerators, warewashing areas, toilet rooms, mobile food establishment servicing areas, and areas subject to flushing or spray cleaning methods.

(b) Outdoor areas, surface characteristics.

(1) Walking and driving areas. The outdoor walking and driving areas shall be surfaced with concrete, asphalt, or gravel or other materials that have been effectively treated to minimize dust, facilitate maintenance, and prevent muddy conditions.

(2) Exterior surfaces. Exterior surfaces of buildings and mobile food establishments shall be of weather-resistant materials and shall comply with law.

(3) Storage areas. Outdoor storage areas for refuse, recyclables, or returnables shall be of materials specified under §229.166(l)(2) and (3) of this title (relating to Water, Plumbing and Waste).

(c) Floors, walls, and ceilings.

(1) Cleanability. Except as specified under paragraph (4) of this subsection, the floors, floor coverings, walls, wall coverings, and ceilings shall be designed, constructed, and installed so they are smooth and easily cleanable, except that antislip floor coverings or applications may be used for safety reasons.

(2) Floors, walls, and ceilings, utility lines.

(A) Utility service lines and pipes may not be unnecessarily exposed.

(B) Exposed utility service lines and pipes shall be installed so they do not obstruct or prevent cleaning of the floors, walls, or ceilings.

(C) Exposed horizontal utility service lines and pipes may not be installed on the floor.

(3) Floor and wall junctures, covered, and enclosed or sealed.

(A) In food establishments in which cleaning methods other than water flushing are used for cleaning floors, the floor and wall junctures shall be coved and closed to no larger than 1 mm (one thirty-second inch).

(B) The floors in food establishments in which water flush cleaning methods are used shall be provided with drains and be graded to drain, and the floor and wall junctures shall be covered and sealed.

(4) Floor carpeting, restrictions and installation.

(A) A floor covering such as carpeting or similar material may not be installed as a floor covering in food preparation areas, walk-in refrigerators, warewashing areas, toilet room areas where handwashing lavatories, toilets, and urinals are located, refuse storage rooms, or other areas where the floor is subject to moisture, flushing, or spray cleaning methods.

(B) If carpeting is installed as a floor covering in areas other than those specified under subparagraph (A) of this paragraph, it shall be:

(i) securely attached to the floor with a durable mastic, by using a stretch and tack method, or by another method; and

(ii) installed tightly against the wall under the coving or installed away from the wall with a space between the carpet and the wall and with the edges of the carpet secured by metal stripping or some other means.

(5) Floor covering, mats and duckboards. Mats and duckboards shall be designed to be removable and easily cleanable.

(6) Wall and ceiling coverings and coatings.

(A) Wall and ceiling covering materials shall be attached so that they are easily cleanable.

(B) Except in areas used only for dry storage, concrete, porous blocks, or bricks used for indoor wall construction shall be finished and sealed to provide a smooth, nonabsorbent, easily cleanable surface.

(7) Walls and ceilings, attachments.

(A) Except as specified in subparagraph (B) of this paragraph, attachments to walls and ceilings such as light fixtures, mechanical room ventilation system components, vent covers, wall mounted fans, decorative items, and other attachments shall be easily cleanable.

(B) In a consumer area, wall and ceiling surfaces and decorative items and attachments that are provided for ambiance need not meet this requirement if they are kept clean.

(8) Walls and ceilings, studs, joists, and rafters. Studs, joists, and rafters may not be exposed in areas subject to moisture. This requirement does not apply to temporary food establishments.

(d) Functionality.

(1) Light bulbs, protective shielding.

(A) Except as specified in subparagraph (B) of this paragraph, light bulbs shall be shielded, coated, or otherwise shatter-resistant in areas where there is exposed food; clean equipment, utensils, and linens; or unwrapped single-service and single-use articles.

(B) Shielded, coated, or otherwise shatter-resistant bulbs need not be used in areas used only for storing food in unopened packages; if:

(i) the integrity of the packages can not be affected by broken glass falling onto them; and

(ii) the packages are capable of being cleaned of debris from broken bulbs before the packages are opened.

(C) An infrared or other heat lamp shall be protected against breakage by a shield surrounding and extending beyond the bulb so that only the face of the bulb is exposed.

(2) Heating, ventilating, air conditioning system vents. Heating, ventilating, and air conditioning systems shall be designed and installed so that make-up air intake and exhaust vents do not cause contamination of food, food-contact surfaces, equipment, or utensils.

(3) Insect control devices, design and installation.

(A) Insect control devices that are used to electrocute or stun flying insects shall be designed to retain the insect within the device.

(B) Insect control devices shall be installed so that:

(i) the devices are not located over a food preparation area; and

(ii) dead insects and insect fragments are prevented from being impelled onto or falling on exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

(4) Toilet rooms, enclosed. A toilet room located on the premises shall be completely enclosed and provided with a tight-fitting and self-closing door except that this requirement does not apply to a toilet room that is located outside a food establishment and does not open directly into the food establishment such as a toilet room that is provided by the management of a shopping mall.

(5) Outer openings, protected.

(A) Except as specified in subparagraphs (B) - (E) of this paragraph, outer openings of a food establishment shall be protected against the entry of insects and rodents by:

(i) filling or closing holes and other gaps along floors, walls, and ceilings;

(ii) closed, tight-fitting windows; and

(iii) solid, self-closing, tight-fitting doors.

(B) Subparagraph (A) of this paragraph does not apply if a food establishment opens into a larger structure, such as a mall, airport, or office building, or into an attached structure, such as a porch, and the outer openings from the larger or attached structure are protected against the entry of insects and rodents.

(C) Exterior doors used as exits need not be self-closing if they are:

(i) solid and tight-fitting;

(ii) designated for use only when an emergency exists, by the fire protection authority that has jurisdiction over the food establishment; and

(iii) limited-use so they are not used for entrance or exit from the building for purposes other than the designated emergency exit use.

(D) Except as specified in subparagraphs (B) and (E) of this paragraph, if the windows or doors of a food establishment, or of a larger structure within which a food establishment is located, are kept open for ventilation or other purposes or a temporary food establishment is not provided with windows and doors as specified under subparagraph (A) of this paragraph, the openings shall be protected against the entry of insects and rodents by:

(i) 16 mesh to 25.4mm (16 mesh to 1 inch) screens;

(ii) properly designed and installed air curtains to control flying insects; or

(iii) other effective means.

(E) Subparagraph (D) of this paragraph does not apply if flying insects and other pests are absent due to the location of the establishment, the weather, or other limiting condition.

(6) Exterior walls and roofs, protective barrier. Perimeter walls and roofs of a food establishment shall effectively protect the establishment from the weather and the entry of insects, rodents, and other animals.

(7) Outdoor food vending areas, overhead protection. If located outside, a machine used to vend food shall be provided with overhead protection except that machines vending canned beverages need not meet this requirement.

(8) Outdoor walking and driving surfaces, graded to drain. Exterior walking and driving surfaces shall be graded to drain.

(9) Outdoor refuse areas, curbed and graded to drain. Outdoor refuse areas shall be constructed in accordance with law and shall be curbed and graded to drain to collect and dispose of liquid waste that results from the refuse and from cleaning the area and waste receptacles.

(10) Private homes and living or sleeping quarters, use prohibition. A private home, a room used as living or sleeping quarters, or an area directly opening into a room used as living or sleeping quarters may not be used for conducting food establishment operations.

(11) Living or sleeping quarters, separation. Living or sleeping quarters located on the premises of a food establishment such as those provided for lodging registration clerks or resident managers shall be separated from rooms and areas used for food establishment operations by complete partitioning and solid self-closing doors.

(e) Handwashing facilities.

(1) Minimum number. Handwashing facilities shall be provided as specified under §229.166(g)(1) of this title.

(2) Handwashing cleanser, availability. Each handwashing lavatory or group of 2 adjacent lavatories shall be provided with a supply of hand cleaning liquid, powder, or bar soap.

(3) Hand drying provision. Each handwashing lavatory or group of adjacent lavatories shall be provided with:

(A) individual, disposable towels;

(B) a continuous towel system that supplies the user with a clean towel; or

(C) a heated-air hand drying device.

(4) Handwashing aids and devices, use restrictions. A sink used for food preparation or utensil washing, or a service sink or curbed cleaning facility used for the disposal of mop water or similar wastes, may not be provided with the handwashing aids and devices required for a handwashing lavatory as specified in paragraphs (2) and (3) of this subsection and §229.166(l)(7)(C) of this title.

(5) Handwashing signage. A sign, icon, or poster that notifies food employees to wash their hands shall be provided at all handwashing lavatories used by food employees and shall be clearly visible to food employees.

(6) Disposable towels, waste receptacle. A handwashing lavatory or group of adjacent lavatories that is provided with disposable towels shall be provided with a waste receptacle as specified under §229.166(l)(7)(C) of this title.

(f) Toilets and urinals.

(1) Minimum number. Toilets and urinals shall be provided as specified under §229.166(g)(2) of this title.

(2) Toilet tissue, availability. A supply of toilet tissue shall be available at each toilet.

(g) Lighting, intensity. The light intensity shall be:

(1) at least 110 lux (10 foot candles) at a distance of 75 cm (30 inches) above the floor, in walk-in refrigeration units and dry food storage areas and in other areas and rooms during periods of cleaning;

(2) at least 220 lux (20 foot candles):

(A) at a surface where food is provided for consumer self-service such as buffets and salad bars or where fresh produce or packaged foods are sold or offered for consumption;

(B) inside equipment such as reach-in and under-counter refrigerators;

(C) at a distance of 75 cm (30 inches) above the floor in areas used for handwashing, warewashing, and equipment and utensil storage, and in toilet rooms; and

(3) at least 540 lux (50 foot candles) at a surface where a food employee is working with food or working with utensils or equipment such as knives, slicers, grinders, or saws where employee safety is a factor.

(h) Ventilation, mechanical. If necessary to keep rooms free of excessive heat, steam, condensation, vapors, obnoxious odors, smoke, and fumes, mechanical ventilation of sufficient capacity shall be provided.

(i) Dressing areas and lockers, designation.

(1) Dressing rooms or dressing areas shall be designated if employees routinely change their clothes in the establishment.

(2) Lockers or other suitable facilities shall be provided for the orderly storage of employees' clothing and other possessions.

(j) Service sinks, availability. A service sink or curbed cleaning facility shall be provided as specified under §229.166(g)(3) of this title.

(k) Handwashing facilities, conveniently located. Handwashing facilities shall be conveniently located as specified under §229.166(h)(1) of this title.

(l) Toilet rooms, convenience and accessibility. Toilet rooms shall be conveniently located and accessible to employees during all hours of operation.

(m) Employee accommodations, designated areas.

(1) Areas designated for employees to eat, drink, and use tobacco shall be located so that food, equipment, linens, and single-service and single-use articles are protected from contamination.

(2) Lockers or other suitable facilities shall be located in a designated room or area where contamination of food, equipment, utensils, linens, and single-service and single-use articles cannot occur.

(n) Distressed merchandise, segregation and location. Products that are held by the permit holder for credit, redemption, or return to the distributor, such as damaged, spoiled, or recalled products, shall be segregated and held in designated areas that are separated from food, equipment, utensils, linens, and single-service and single-use articles.

(o) Receptacles, waste handling units, and designated storage areas. Units, receptacles, and areas designated for storage of refuse and

recyclable and returnable containers shall be located as specified under §229.166(l)(10)(A) of this title.

(p) Premises, buildings, systems, rooms, fixtures, equipment, devices, and materials.

(1) Repairing. The physical facilities shall be maintained in good repair.

(2) Cleaning, frequency and restrictions.

(A) The physical facilities shall be cleaned as often as necessary to keep them clean.

(B) Cleaning shall be done during periods when the least amount of food is exposed such as after closing. This requirement does not apply to cleaning that is necessary due to a spill or other accident.

(3) Cleaning floors, dustless methods.

(A) Except as specified in subparagraph (B) of this paragraph, only dustless methods of cleaning shall be used, such as wet cleaning, vacuum cleaning, mopping with treated dust mops, or sweeping using a broom and dust-arresting compounds.

(B) Spills or drippage on floors that occur between normal floor cleaning times may be cleaned:

(i) without the use of dust-arresting compounds; and

(ii) in the case of liquid spills or drippage, with the use of a small amount of absorbent compound such as sawdust or diatomaceous earth applied immediately before spot cleaning.

(4) Cleaning ventilation systems, nuisance and discharge prohibition.

(A) Intake and exhaust air ducts shall be cleaned and filters changed so they are not a source of contamination by dust, dirt, and other materials.

(B) If vented to the outside, ventilation systems may not create a public health hazard or nuisance or unlawful discharge.

(5) Cleaning maintenance tools, preventing contamination. Food preparation sinks, handwashing lavatories, and warewashing equipment may not be used for the cleaning of maintenance tools, the preparation or holding of maintenance materials, or the disposal of mop water and similar liquid wastes.

(6) Drying mops. After use, mops shall be placed in a position that allows them to air-dry without soiling walls, equipment, or supplies.

(7) Absorbent materials on floors, use limitation. Except as specified in paragraph (3)(A) of this subsection, sawdust, wood shavings, granular salt, baked clay, diatomaceous earth, or similar materials may not be used on floors.

(8) Maintaining and using handwashing facilities. Handwashing facilities shall be kept clean, and maintained and used as specified under §229.166(i)(1)(A) of this title.

(9) Closing toilet room doors. Toilet room doors as specified under subsection (d)(4) of this section shall be kept closed except during cleaning and maintenance operations.

(10) Using dressing rooms and lockers.

(A) Dressing rooms shall be used by employees if the employees regularly change their clothes in the establishment.

(B) Lockers or other suitable facilities shall be used for the orderly storage of employee clothing and other possessions.

(11) Controlling pests. The presence of insects, rodents, and other pests shall be controlled to minimize their presence within the physical facility and its contents, and on the contiguous land or property under the control of the permit holder by:

(A) routinely inspecting incoming shipments of food and supplies;

(B) routinely inspecting the premises for evidence of pests;

(C) using methods, if pests are found, such as trapping devices or other means of pest control as specified under §229.168(d)(2), (h)(2), and (h)(3)(A) of this title (relating to Poisonous or Toxic Materials); and

(D) eliminating harborage conditions.

(12) Removing dead or trapped birds, insects, rodents, and other pests. Dead or trapped birds, insects, rodents, and other pests shall be removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of pests.

(13) Storing maintenance tools. Maintenance tools such as brooms, mops, vacuum cleaners, and similar items shall be:

(A) stored so they do not contaminate food, equipment, utensils, linens, and single-service and single-use articles; and

(B) stored in an orderly manner that facilitates cleaning the area used for storing the maintenance tools.

(14) Maintaining premises, unnecessary items and litter. The premises shall be free of:

(A) items that are unnecessary to the operation or maintenance of the establishment such as equipment that is nonfunctional or no longer used; and

(B) litter.

(15) Prohibiting animals.

(A) Except as specified in subparagraphs (B) and (C) of this paragraph, live animals may not be allowed on the premises of a food establishment.

(B) Live animals may be allowed in the following situations if the contamination of food, clean equipment, utensils, linens, and unwrapped single-service and single-use articles cannot result:

(i) edible fish or decorative fish in aquariums, shellfish or crustacea on ice or under refrigeration, and shellfish and crustacea in display tank systems;

(ii) patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;

(iii) in areas that are not used for food preparation and that are usually open for customers, such as dining and sales areas, service animals that are controlled by the disabled employee or person, or service animals in training when accompanied by an approved trainer, if a health or safety hazard will not result from the presence or activities of the service animal;

(iv) pets in the common dining areas of institutional care facilities such as nursing homes, assisted living facilities, group homes, or residential care facilities at times other than during meals if:

(I) effective partitioning and self-closing doors separate the common dining areas from food storage or food preparation areas;

(II) condiments, equipment, and utensils are stored in enclosed cabinets or removed from the common dining areas when pets are present; and

(III) dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service; and

(v) in areas that are not used for food preparation, storage, sales, display, or dining, in which there are caged animals or animals that are similarly confined, such as in a variety store that sells pets or a tourist park that displays animals.

(C) Live or dead fish bait may be stored if contamination of food, clean equipment, utensils, linens, and unwrapped single-service and single-use articles cannot result.

§229.169. Mobile Food Establishments.

(a) Mobile food establishment provisions.

(1) General. Mobile food establishments shall comply with the requirements of these rules, except as otherwise provided in this paragraph and in paragraph (2) of this subsection. The regulatory authority may impose additional requirements to protect against health hazards related to the conduct of the food establishment as a mobile operation, may prohibit the sale of some or all potentially hazardous food, and when no health hazard will result, may waive or modify requirements of this rule relating to physical facilities, except those requirements as specified in paragraphs (5) and (6) of this subsection; subsection (c)(1)(A) - (E) of this section and §229.164(k) - (o) of this title (relating to Food). The regulatory authority may require a mobile food establishment operator to demonstrate that the vehicle is readily moveable.

(2) Restricted operation. Mobile food establishments that serve only food that is prepared, packaged in individual servings, transported and stored under conditions meeting the requirements of these sections, or beverages that are not potentially hazardous and are dispensed from covered urns or other protected equipment, need not comply with the requirements of these rules pertaining to the necessity of water and sewage systems nor to those requirements pertaining to the cleaning and sanitization of equipment and utensils if the required equipment for cleaning and sanitization exists at its central preparation facility.

(3) Single-service articles. Mobile food establishments shall provide only single service articles for use by the consumer.

(4) Existing refrigeration equipment. Existing refrigeration equipment will be upgraded to meet the 41 degree Fahrenheit requirement and countertop, under-counter and open-top refrigeration units shall be upgraded or replaced, as specified in §229.164(o)(6)(B)(ii) of this title.

(5) Mobile water system materials, design, and operation. Mobile food establishment water systems shall meet the requirements of §229.166(i)(6) of this title (relating to Water, Plumbing, and Waste).

(6) Mobile food establishment tank inlet. A mobile food establishment's water tank inlet shall be:

(A) 19.1 mm (3/4 inch) in inner diameter or less; and

(B) provided with a hose connection of a size or type that will prevent its use for any other service.

(7) Readily moveable. The regulatory authority may prohibit alteration, removal, attachments, placement or change in, under, or upon the mobile food establishment that would prevent or otherwise reduce ready mobility. A regulatory authority may require a mobile food establishment to come, on an annual basis, to a location designated by the regulatory authority as proof that the mobile food establishment is readily moveable. A regulatory authority may require that mobile food establishments that violate this section go for re-inspections to a location designated by the regulatory authority.

(8) Sewage, other liquid waste, and rainwater.

(A) Waste retention. If liquid waste results from operation of a mobile food establishment, the waste shall be stored in a permanently installed retention tank.

(B) Capacity and drainage. A sewage holding tank in a mobile food establishment shall be:

(i) sized at least 15% larger in capacity than the water supply tank; and

(ii) sloped to a drain that is 25 millimeters (1 inch) in inner diameter or greater, equipped with a shut-off valve.

(C) All connections on the vehicle for servicing the mobile food establishment waste disposal facilities shall be of a different size or type than those used for supplying potable water to the mobile food establishment.

(D) Discharge liquid waste shall not be discharged from the retention tank while the mobile food establishment is in motion.

(E) Flushing a waste retention tank. A tank for liquid waste retention shall be thoroughly flushed and drained in a sanitary manner.

(F) Removing mobile food establishment wastes. Sewage and other liquid wastes shall be removed from a mobile food establishment at an approved waste servicing area or by a sewage transport vehicle in such a way that a public health hazard or nuisance is not created.

(9) Mobile food establishment water and wastewater exemption.

(A) A roadside vendor that sells only prepackaged food is exempt from these rules pertaining to water and wastewater.

(B) A mobile food establishment that prepares food requiring no water for operations and no hand contact with food is exempt from these rules pertaining to water and wastewater if the required cleaning and sanitization equipment exist at its central preparation facility.

(b) Central preparation facility.

(1) Supplies, cleaning, and servicing operations. Mobile food establishments shall operate from a central preparation facility or other fixed food establishment and shall report to such location for supplies and for cleaning and servicing operations.

(2) Construction. The central preparation facility or other fixed food service establishment, used as a base of operation for mobile food establishments, shall be constructed and operated in compliance with the requirements of these rules.

(c) Servicing area and operations.

(1) Protection.

(A) A mobile food establishment servicing area shall be provided and shall include at least overhead protection for any supplying, cleaning, or servicing operation except those areas used only for the loading of water and/or the discharge of sewage and other liquid waste, through the use of a closed system of hoses, need not be provided with overhead protection.

(B) Within this servicing area, a location provided for the flushing and drainage of liquid wastes shall be separate from the location provided for water servicing and for the loading and unloading of food and related supplies.

(C) This servicing area will not be required where only packaged food is placed on the mobile food establishment or where mobile food establishments do not contain waste retention tanks.

(D) The surface of the servicing area shall be constructed of a smooth nonabsorbent material, such as concrete or machine-laid asphalt and shall be maintained in good repair, kept clean, and be graded to drain.

(E) Potable water servicing equipment shall be installed in the servicing area according to law and stored and handled in a way that protects the water and equipment from contamination.

(2) Construction exemption. The construction of the walls and ceilings of the servicing area is exempted from the provisions of §229.167(c)(1) of this title (relating to Physical Facilities).

§229.171. Compliance and Enforcement.

(a) Use for intended purpose, public health protection.

(1) Safeguarding public health. The regulatory authority shall apply these rules to promote its underlying purpose, as specified in §229.161 of this title (relating to Purpose), of safeguarding public health and ensuring that food is safe, unadulterated, and honestly presented when offered to the consumer.

(2) Assessment of existing facilities. In enforcing the provisions of these rules, the regulatory authority shall assess existing facilities or equipment that were in use before the effective date of these rules based on the following considerations:

(A) whether the facilities or equipment are in good repair and capable of being maintained in a sanitary condition;

(B) whether food-contact surfaces comply with §229.165(a) of this title (relating to Equipment, Utensils, and Linens); and

(C) whether the capacities of cooling, heating, and holding equipment are sufficient to comply with §229.165(g)(1) of this title.

(b) Additional requirements, preventing health hazards, provision for conditions not addressed.

(1) Option to impose additional requirements. If necessary to protect against public health hazards or nuisances, the regulatory authority may impose specific requirements in addition to the requirements contained in these rules that are authorized by law.

(2) Required documentation. The regulatory authority shall document the conditions that necessitate the imposition of additional requirements and the underlying public health rationale. The documentation shall be provided to the permit applicant or permit holder and a copy shall be maintained in the regulatory authority's file for the food establishment.

(c) Variances.

(1) Modifications and waivers. The regulatory authority may grant a variance by modifying or waiving the requirements of these rules if in the opinion of the regulatory authority a health hazard or nuisance will not result from the variance. If a variance is granted, the regulatory authority shall retain the information specified in paragraph (2) of this subsection in its records for the food establishment.

(2) Documentation of proposed variance and justification. Before a variance from a requirement of these rules is approved, the information that shall be provided by the person requesting the variance and retained in the regulatory authority's file on the food establishment includes:

(A) a statement of the proposed variance of the rule requirement citing relevant rule section numbers;

(B) an analysis of the rationale for how the potential public health hazards and nuisances addressed by the relevant rule sections will be alternatively addressed by the proposal; and

(C) a HACCP plan if required as specified in subsection (d)(1)(A) of this section that includes the information specified in subsection (d)(2)(A) of this section, as it is relevant to the variance requested.

(3) Conformance with approved procedures. If the regulatory authority grants a variance as specified in paragraph (1) of this subsection, or a HACCP plan is otherwise required as specified in subsection (d)(1) of this section, the food establishment shall:

(A) comply with the HACCP plans and procedures that are submitted and approved as specified in subsection (d)(2) of this section as a basis for the modification or waiver; and

(B) maintain and provide to the regulatory authority, upon request, records specified in subsection (d)(2)(D) and (E) of this section that demonstrate that the following are routinely employed:

(i) procedures for monitoring critical control points;

(ii) monitoring of the critical control points;

(iii) verification of the effectiveness of an operation or process; and

(iv) necessary corrective actions if there is failure at a critical control point.

(d) HACCP plan requirements.

(1) When a HACCP plan is required.

(A) Before engaging in an activity that requires a HACCP plan, a food establishment shall submit to the regulatory authority for approval a properly prepared HACCP plan as specified under paragraph (2) of this subsection and the relevant provisions of these rules if:

(i) submission of a HACCP plan is required according to law;

(ii) a variance is required as specified under §§229.164(k)(1)(D)(iii) and (p)(1)(A) - (H), or 229.165(f)(10)(B) of this title; or

(iii) the regulatory authority determines that a food preparation or processing method requires a variance based on an inspectional finding or a variance request.

(B) A food establishment shall have a properly prepared HACCP plan as specified under §229.164(o)(2) of this title.

(2) Contents of a HACCP plan. For a food establishment that is required under paragraph (1) of this subsection to have a HACCP plan, the plan and specifications shall indicate:

(A) a categorization of the types of potentially hazardous foods that are specified in the menu such as soups and sauces, salads, and bulk, solid foods such as meat roasts, or of other foods that are specified by the regulatory authority;

(B) a flow diagram by specific food or category type identifying critical control points and providing information on the following:

(i) ingredients, materials, and equipment used in the preparation of that food; and

(ii) formulations or recipes that delineate methods and procedural control measures that address the food safety concerns involved;

(C) food employee and supervisory training plan that addresses the food safety issues of concern;

(D) a statement of standard operating procedures for the plan under consideration including clearly identifying:

(i) each critical control point;

(ii) the critical limits for each critical control point;

(iii) the method and frequency for monitoring and controlling each critical control point by the food employee designated by the person in charge;

(iv) the method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points;

(v) action to be taken by the person in charge if the critical limits for each critical control point are not met; and

(vi) records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed; and

(E) additional scientific data or other information, as required by the regulatory authority, supporting the determination that food safety is not compromised by the proposal.

(e) Confidentiality, trade secrets. The regulatory authority shall treat as confidential in accordance with the requirements of the Public Information Act, Texas Government Code, Chapter 552, information that meets the criteria specified in law for a trade secret and is contained on inspection report forms and in the plans and specifications submitted as specified in subsection (d)(2) of this section.

(f) Permit requirement, prerequisite for operation. A person may not operate a food establishment without a valid permit or license to operate issued by the regulatory authority.

(g) Conditions of retention, responsibilities of the permit holder. Upon acceptance of the permit issued by the regulatory authority, the permit holder in order to retain the permit shall:

(1) post the permit in a location in the food establishment that is conspicuous to consumers;

(2) comply with the provisions of these rules including the conditions of a granted variance as specified under subsection (c)(3) of this section;

(3) if a food establishment is required under subsection (d)(1) of this section to operate under a HACCP plan, comply with the plan as specified under subsection (c)(3) of this section;

(4) immediately contact the regulatory authority to report an illness of a food employee as specified under §229.163(d)(5) of this title (relating to Management and Personnel);

(5) immediately discontinue operations and notify the regulatory authority if an imminent health hazard may exist as specified under subsection (k) of this section;

(6) allow representatives of the regulatory authority access to the food establishment as specified under subsection (i)(1) of this section;

(7) except as specified under paragraph (8) of this section, replace existing facilities and equipment specified in subsection (a) of this section with facilities and equipment that comply with these rules if:

(A) the regulatory authority directs the replacement because the facilities and equipment constitute a public health hazard or nuisance or no longer comply with the criteria upon which the facilities and equipment were accepted;

(B) the regulatory authority directs the replacement of the facilities and equipment because of a change of ownership; or

(C) the facilities and equipment are replaced in the normal course of operation;

(8) upgrade or replace countertop, under-counter and open-top refrigeration units located in the food preparation area as specified under §229.164(o)(6)(B)(ii) of this title, if the circumstances specified under paragraph (7)(A) - (C) of this subsection do not occur first;

(9) comply with directives of the regulatory authority including time frames for corrective actions specified in inspection reports, notices, orders, warnings, and other directives issued by the regulatory authority in regard to the permit holder's food establishment or in response to community emergencies;

(10) accept notices issued and served by the regulatory authority according to law; and

(11) be subject to the administrative, civil, injunctive, and criminal remedies authorized in law for failure to comply with these rules or a directive of the regulatory authority, including time frames for corrective actions specified in inspection reports, notices, orders, warnings, and other directives.

(h) Inspection frequency, performance-based and risk based. The regulatory authority should inspect each food establishment at least once every six months. If the regulatory authority cannot meet this frequency, inspection frequency shall be prioritized based upon assessment of a food establishment's history of compliance with these rules and the potential for causing foodborne illness by evaluating:

(1) past performance, for nonconformance with these rules or HACCP plan requirements that are critical;

(2) past performance, for numerous or repeat violations of these rules or HACCP plan requirements that are noncritical;

(3) past performance, for complaints investigated and found to be valid;

(4) the hazards associated with the particular foods that are prepared, stored, or served;

(5) the type of operation including the methods and extent of food storage, preparation, and service;

(6) the number of people served;

(7) whether the population served is a highly susceptible population; and

(8) any other risk factor deemed relevant to the operation by the regulatory authority.

(i) Competency and access.

(1) Competency of inspectors. An individual conducting inspections of retail food establishments should be a Registered Pro-

fessional Sanitarian in Texas or a Sanitarian-in-Training in Texas, as defined in §265.142 of this title (relating to Definitions), or should meet the FDA Voluntary National Retail Food Regulatory Program Standards basic curriculum and field training elements in order to:

(A) assure application of basic scientific principles, including HACCP principles of food safety, during inspections;

(B) properly conduct foodborne illness investigations;

(C) assure uniformity in the interpretations of these rules; and

(D) assure fair and uniform enforcement of these rules.

(2) Access allowed at reasonable times after due notice. After the regulatory authority presents official credentials and provides notice of the purpose of, and an intent to conduct, an inspection, the person in charge shall allow the regulatory authority to determine if the food establishment is in compliance with these rules by allowing access to the establishment, allowing inspection, and providing information and records specified in these rules and to which the regulatory authority is entitled according to law, during the food establishment's hours of operation and other reasonable times.

(3) Refusal, notification of right to access, and final request for access. If a person denies access to the regulatory authority, the regulatory authority shall:

(A) inform the person that:

(i) the food establishment is required to allow access to the regulatory authority as specified under this subsection;

(ii) access is a condition of the acceptance and retention of a food establishment permit to operate as specified under subsection (g)(6) of this section; and

(iii) if access is denied, an order issued by the appropriate authority allowing access, hereinafter referred to as an inspection warrant, may be obtained according to law; and

(B) make a final request for access.

(4) Refusal, reporting. If after the regulatory authority presents credentials and provides notice as specified under paragraph (2) of this subsection, explains the authority upon which access is requested, and makes a final request for access as specified in paragraph (3) of this subsection, the person in charge continues to refuse access, the regulatory authority shall provide details of the denial of access on an inspection report form.

(5) Inspection warrant to gain access. If denied access to a food establishment for an authorized purpose and after complying with paragraph (2) of this subsection, the regulatory authority may issue, or apply for the issuance of, an inspection warrant to gain access as provided in law.

(j) Report of findings.

(1) Documenting information and observations. The regulatory authority shall document on an inspection report form:

(A) administrative information about the food establishment's legal identity, street and mailing addresses, inspection date, and other information such as status of the permit, and personnel certificates that may be required; and

(B) specific factual observations of violative conditions or other deviations from these rules that require correction by the permit holder including:

(i) failure of the person in charge to demonstrate the knowledge of foodborne illness prevention, application of HACCP principles, and the requirements of these rules specified under §229.163(b) of this title;

(ii) failure of food employees and the person in charge to demonstrate their knowledge of their responsibility to report a disease or medical condition as specified under §§229.163(d)(4)(A) - (B) and (d)(5) of this title;

(iii) nonconformance with critical items of these rules;

(iv) failure of the appropriate food employees to demonstrate their knowledge of, and ability to perform in accordance with, the procedural, monitoring, verification, and corrective action practices required by the regulatory authority as specified under subsection (c)(3) of this section;

(v) failure of the person in charge to provide records required by the regulatory authority for determining conformance with a HACCP plan as specified under subsection (d)(2)(D)(vi) of this section; and

(vi) nonconformance with critical limits of a HACCP plan; and

(C) a summary of the inspectional findings that totals weighted demerit values for the inspection items.

(2) Specifying time frame for corrections. The regulatory authority shall specify on the inspection report form the time frame for correction of the violations as specified under subsections (k)(1), (l)(1), and (m) of this section.

(3) Issuing report and obtaining acknowledgment of receipt. At the conclusion of the inspection and according to law, the regulatory authority shall provide a copy of the completed inspection report and the notice to correct violations to the permit holder or to the person in charge, and request a signed acknowledgment of receipt.

(4) Refusal to sign acknowledgment. The regulatory authority shall:

(A) inform a person who declines to sign an acknowledgment of receipt of inspectional findings as specified in paragraph (3) of this subsection that:

(i) an acknowledgment of receipt is not an agreement with findings;

(ii) refusal to sign an acknowledgment of receipt will not affect the permit holder's obligation to correct the violations noted in the inspection report within the time frames specified; and

(iii) a refusal to sign an acknowledgment of receipt is noted in the inspection report and conveyed to the regulatory authority's historical record for the food establishment; and

(B) make a final request that the person in charge sign an acknowledgment receipt of inspectional findings.

(5) Public information. Except as specified in subsection (e) of this section, the regulatory authority shall treat the inspection report as a public document and shall make it available for disclosure to a person who requests it as provided in law.

(6) Inspection reports. For the purposes of Chapter 437, Texas Health and Safety Code, the department adopts the Retail Food Establishment Inspection Report form as specified in the following figure:

Figure: 25 TAC §229.171(j)(6)

(k) Imminent health hazard.

(1) Ceasing operations and reporting.

(A) Except as specified in subparagraph (B) of this paragraph, a food establishment shall immediately discontinue operations and notify the regulatory authority if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross insanitary occurrence or condition, or other circumstance that may endanger public health.

(B) A permit holder need not discontinue operations in an area of an establishment that is unaffected by the imminent health hazard.

(2) Resumption of operations. If operations are discontinued as specified under paragraph (1) of this subsection or otherwise according to law, the permit holder shall obtain approval from the regulatory authority before resuming operations.

(l) Critical violations, time frame for correction.

(1) Timely correction.

(A) Except as specified in subparagraph (B) of this paragraph, the food establishment shall at the time of inspection implement immediate corrective actions of a critical violation of these rules and implement corrective actions for a HACCP plan provision that is not in compliance with its critical limit.

(B) Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the regulatory authority may agree to or specify a longer time frame, not to exceed 10 calendar days after the inspection, for the food establishment to correct critical rule violations or HACCP plan deviations.

(2) Verification and documentation of correction.

(A) After observing at the time of inspection a correction of a critical violation or deviation, the regulatory authority shall enter the violation and information about the corrective action on the inspection report.

(B) As specified under paragraph (1)(B) of this subsection, after receiving notification that the food establishment has corrected a critical violation or HACCP plan deviation, or at the end of the specified period of time, the regulatory authority shall verify correction of the violation, document the information on an inspection report, and enter the report in the regulatory authority's records.

(C) When the total cumulative demerit value of an establishment exceeds 30 demerits, the establishment shall initiate immediate corrective action on all identified critical violations and shall initiate corrective action on all other violations within 48 hours. One or more reinspections shall be conducted at reasonable time intervals to assure correction.

(D) In the case of temporary food establishments, all critical violations must be corrected immediately and other violations must be corrected within 24 hours or sooner if required by the regulatory authority. If violations are not corrected, the establishment shall immediately cease food operations until authorized to resume by the regulatory authority.

(m) Other violations, time frame for correction.

(1) Time frame. Except as specified in paragraph (2) of this section, the food establishment shall correct other violations by a date and time agreed to or specified by the regulatory authority but no later than 90 calendar days after the inspection.

(2) Extension of compliance schedule. The regulatory authority may approve a compliance schedule that extends beyond the time limits specified under paragraph (1) of this subsection if a written schedule of compliance is submitted by the food establishment and no health hazard exists or will result from allowing an extended schedule for compliance.

(n) Examination and detention of food. The regulatory authority may examine and collect samples of food as often as necessary for the enforcement of these rules. A receipt for samples shall be issued by the regulatory authority. The department shall, upon written notice to the owner or person in charge specifying the reason therefore, place under detention any food which it has probable cause to believe is adulterated or misbranded in accordance with the provisions of the Texas Food, Drug, and Cosmetic Act, Texas Health and Safety Code, Chapter 431.

(o) Investigation and control.

(1) Obtaining information: personal history of illness, medical examination, and specimen analysis. The regulatory authority shall act when it has reasonable cause to believe that a food employee has possibly transmitted disease; may be infected with a disease in a communicable form that is transmissible through food; may be a carrier of infectious agents that cause a disease that is transmissible through food; or is affected with a boil, an infected wound, or acute respiratory infection, by:

(A) securing a confidential medical history of the employee suspected of transmitting disease or making other investigations as deemed appropriate; and

(B) requiring appropriate medical examinations, including collection of specimens for laboratory analysis, of a suspected employee and other employees.

(2) Restriction or exclusion of food employee, or summary suspension of permit. Based on the findings of an investigation related to a food employee who is suspected of being infected or diseased, the regulatory authority may issue an order to the suspected food employee or permit holder instituting one or more of the following control measures:

(A) restricting the food employee;

(B) excluding the food employee; or

(C) closing the food establishment by summarily suspending a permit to operate in accordance with law.

(3) Restriction or exclusion order: warning or hearing not required, information required in order. Based on the findings of the investigation as specified in paragraph (1) of this subsection and to control disease transmission, the regulatory authority may issue an order of restriction or exclusion to a suspected food employee or the permit holder without prior warning, notice of a hearing, or a hearing if the order:

(A) states the reasons for the restriction or exclusion that is ordered;

(B) states the evidence that the food employee or permit holder shall provide in order to demonstrate that the reasons for the restriction or exclusion are eliminated;

(C) states that the suspected food employee or the permit holder may request an appeal hearing by submitting a timely request as provided in law; and

(D) provides the name and address of the regulatory authority representative to whom a request for an appeal hearing may be made.

(4) Release of food employee from restriction or exclusion. The regulatory authority shall release a food employee from restriction or exclusion according to Texas Health and Safety Code, Chapter 438, §438.033, and the following conditions:

(A) a food employee who was infected with Salmonella typhi if the food employee's stools are negative for S. typhi based on testing of at least three consecutive stool specimen cultures that are taken:

(i) not earlier than one month after onset;

(ii) at least 48 hours after discontinuance of antibiotics; and

(iii) at least 24 hours apart;

(B) if one of the cultures taken as specified in subparagraph (A) of this paragraph is positive, repeat cultures are taken at intervals of one month until at least three consecutive negative stool specimen cultures are obtained;

(C) a food employee who was infected with Shigella spp. or Shiga toxin-producing Escherichia coli if the employee's stools are negative for Shigella spp. or Shiga toxin-producing Escherichia coli based on testing of two consecutive stool specimen cultures that are taken:

(i) not earlier than 48 hours after discontinuance of antibiotics; and

(ii) at least 24 hours apart; and

(D) a food employee who was infected with hepatitis A virus if:

(i) symptoms cease; or

(ii) at least two blood tests show falling liver enzymes.

(p) Reporting of communicable diseases.

(1) Who shall report. Certain persons, as required in §97.2 of this title (relating to Who Shall Report), shall report certain confirmed and suspected foodborne diseases.

(2) What to report. Confirmed and suspected cases of the following diseases, including, but not limited to the following, are reportable: botulism; campylobacteriosis; cryptosporidiosis; Escherichia coli 0157:H7; hepatitis A, acute viral; listeriosis; salmonellosis; shigellosis; trichinosis; and Vibrio infection.

(3) When to report. Reporting of communicable diseases shall be done in accordance with §97.4 of this title (relating to When To Report a Condition or Isolate; Where to Submit an Isolate; Where to Report a Condition or Isolate).

(4) Where to report. Persons required to report communicable diseases shall report to the local health authority, or in the case where there is no local health authority, the report shall be made to the department's Regional Director as required in §97.5 of this title (relating to Where To Report a Condition or Isolate; Where To Submit an Isolate).

(5) Reporting and other duties of local health authorities and regional directors. Local health authorities and regional directors shall report communicable diseases to the department as provided for in §97.6 of this title (relating to Reporting and Other Duties of Local Health Authorities and Regional Directors).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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General Counsel
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL

SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §§34.506, 34.507, 34.511, 34.514 - 34.517, 34.519 - 34.521, 34.524

The Commissioner of Insurance adopts amendments to §§34.506, 34.507, 34.511, 34.514 - 34.517, 34.519 - 34.521, and new §34.524, concerning the regulation of fire extinguisher systems. Section 34.506 and §34.517 are adopted with changes to the proposed text as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7171). Sections 34.507, 34.511, 34.514 - 34.516, 34.519 - 34.521 and new §34.524 are adopted without changes.

Insurance Code Article 5.43-1 §9 authorizes the appointment of a Fire Extinguisher Advisory Council (Council) to assist the Commissioner in the review and formulation of rules and changes to rules regulating fire extinguisher systems. The Council assisted in the review and formulation of the proposed rules and recommended changes to the Commissioner. The amendments and new section are necessary to clarify the intent of the existing rules regulating fire extinguisher systems, add requirements to implement the latest improved nationally recognized safety standards, revise requirements to accommodate and facilitate the latest state-of-the-art industry practices, delete outdated language, establish a new specialized type of pre-engineered fixed fire system license for residential cooking appliances, provide a method to notify users of certain performance levels of fixed fire extinguisher systems for commercial cooking areas, and amend licensing administrative procedures to enable the State Fire Marshal's Office (SFMO) to more equitably and efficiently regulate the activities of the fire extinguisher system industry.

The amendments to §34.506(7) and (8) change the term "classification number" in the definitions of "DOT Specification Fire Extinguisher Cylinder" and "DOT Nonspecification Fire Extinguisher Cylinder" to "specification number" to be consistent with the terminology used by the U.S. Department of Transportation.

This is necessary to maintain consistent terminology between federal and state agencies to coordinate enforcement efforts.

The amendments to §34.507 replace the currently adopted National Fire Protection Association (NFPA) standards with the most recent editions of the standards. This update in standards is necessary to maintain the current state-of-the-art technology in the design, use, installation, service and maintenance of fire protection extinguisher equipment and systems. Additionally, other units of government in Texas are adopting these nationally developed standards, and uniformity of standards enables the fire extinguisher firms and local fire officials to be more familiar with the content of standards and enforce them consistently throughout the state.

The amendments to §§34.511(a)(5), 34.515(c)(3), and 34.516(a)(5) set forth the scope, fees, and qualifications for a new specialized Type R license. The qualifications for securing the new Type R license is to be issued to individuals authorizing installation, certification, and servicing of pre-engineered fixed residential range top fire extinguisher systems. Because the license is limited to residential installation, the qualifications are not as stringent as those for other license types. The new specialized license is necessary to increase the licensed workforce available to install these types of systems and to thereby increase the number of fire protection systems installed to protect residential cooking areas.

The amendment to §34.514(a)(4) and (5) deletes the requirement for a firm to provide statements of experience and educational information supporting the firm's qualifications to perform the duties permitted by the certificate of registration. This requirement is unnecessary because the technical ability to perform the duties permitted by the registration is actually a function of the qualifications and experience of the licensed employees and not the business acumen of a firm. The firm's activities are limited to the scope of work permitted by the specific licenses of its employees. The deletion of this requirement will also reduce unneeded paperwork and streamline the licensing process.

The amendments to §34.517(b)(2) clarify that any licensed individual who is authorized to certify a specific type of pre-engineered fixed fire extinguishing systems may certify that type of fire extinguisher system as permitted under the limitations of the individual's license. This is necessary to permit a Type K or Type R licensee to certify their own work which will eliminate the extra and unnecessary cost to employ a Type A or Type PL to certify the work. The amendment to §34.517(c) is needed to clarify that any licensed individual who is authorized to service or install a specific type of pre-engineered fixed fire extinguishing system may service or install that type of fire extinguisher system as permitted under the limitations of the individual's license. The amendment to §34.517(e) permits any unlicensed individual who is employed by a registered fire extinguisher firm to install a fixed fire extinguisher system, other than a pre-engineered fixed system if the installation is performed under the direct supervision of a Type A or Type PL licensee. Insurance Code Article 5.43-1 §6 provides an exception to the licensing requirement for an employee of an unregistered subcontracted firm, and this amendment is necessary to grant the same exception to an employee of a registered firm. One commenter recommended that for clarity the amendment should not only apply to a licensee but also to a permittee. The Department's intent is that the amendment also apply to permittees and therefore agrees with the commenter's recommendation. The rule as adopted is revised to include a permittee. The commenter also recommended, based on extensive experience, that the direct supervision, for other than pre-engineered work, not require "on-site" supervision because this work usually requires the skill of an entirely different trade such as welding or pipe fitting, and the "on-site" supervision by a person with fire protection expertise would not contribute to the task. The Department agrees that this "on-site" supervision for other than pre-engineered work would be economically inefficient, and therefore, the definition of the term "direct supervision" in §34.506(19) is revised to permit off-site supervision by a licensee for the installation of engineered systems by unlicensed employees. The changes to §34.506(19) and proposed §34.517(e) do not introduce new subject matter or affect persons in addition to those subject to the proposal as originally published. The amendments to §34.517(f) specify that after January 1, 2008, the design and equipment of all existing fixed fire extinguisher systems, as installed, for the protection of commercial cooking areas must comply with the minimum standards of UL 300 or a red tag shall be attached. This is necessary because continual technological advancements in modern cooking equipment and the use of new cooking oils make the extinguishment of today's fires with older systems more difficult. A revised system performance test, Standard UL 300, to which new systems must be manufactured, was developed by Underwriters first adopted by Underwriters Laboratories, Inc. on July 13, 1992. Although most existing systems on the market at that time used to protect commercial cooking areas could extinguish a fire, they failed to pass this more difficult test. This resulted in the manufacturing and sales of all new equipment and extinguishing agents for the protection of these hazard areas. Existing systems, installed before the adoption of UL 300, continue to be listed as long as they are maintained according to their listed manufacturer's maintenance manual. However, as maintenance parts for these fire protection systems become unavailable and cooking appliances are replaced, the old fire protection systems cannot be maintained and may or may not extinguish a typical fire when needed. Many of the existing older systems have been voluntarily replaced. This amendment is necessary to permit a gradual replacement of fire protection equipment to phase in the cost of the new equipment necessary to maintain adequate protection to the public and reduce the expense shock of the necessary replacement. Additionally, §34.517 is amended by adding a new subsection (k) to require that the design, performance and equipment for all dry chemical fire extinguishing systems, installed after January 1, 2006, meet the testing requirements of Underwriters Laboratory (UL) test standard UL 1254. This is necessary to ensure that all new systems of this type, installed in Texas, comply with this latest UL standard to adequately provide protection against the hazard.

The amendment to §34.519(a)(4) permits the appropriate licensee to sign the installation label by deleting the reference to a Type A or Type PL licensee. This change is necessary to permit Type K or Type R licensee's to sign and certify their own work which will eliminate the extra and unnecessary cost to employ a Type A or Type PL to certify the work of a Type K or Type R licensee.

The amendment to §34.520(b) specifies that after any service is performed on a fire extinguisher or fixed fire extinguisher system, only one of three types of tags must be attached to differentiate the status of the equipment. The amendment is necessary to add yellow tag and red tag to the types of tags that must be attached. The attachment of a new yellow tag is regulated in new §34.524.

The amendment to §34.521(a) is needed to clarify that the three days within which a written notice of a red tag condition must be

submitted to the owner and authority having jurisdiction (AHJ) means three business days and not calendar days.

New §34.524 sets forth specific criteria for a yellow tag and procedures regarding the placement of a yellow tag on a system. This tag is necessary to notify the property owner and AHJ in advance that certain pre-engineered fixed fire extinguishing systems used to protect commercial cooking appliances and areas that do not meet the UL 300 Standard may not perform as expected and that a red tag will be attached starting on January 1, 2008, in accordance with the amendments to §34.517(f). The new section also requires that the notice indicate that the owner should consider replacing or upgrading the system before that time.

The amendments to §34.506 change the name of the number required by the U.S. Department of Transportation for a DOT Specification Fire Extinguisher Cylinder and a DOT Nonspecification Fire Extinguisher Cylinder from "classification number" to "specification number" to be consistent with the terminology used by that department. The amendments to §34.506(10) clarify the extent of "direct supervision" based on the type of system by requiring "within sight" supervision of individuals installing pre-engineered fixed fire extinguisher systems and not requiring "on-site" supervision of individuals installing engineered fixed fire extinguisher systems.

The amendments to §34.507 adopt by reference certain standards and recommended practices of the National Fire Protection Association (NFPA). The amendments replace current standards with the most recent editions of the adopted standards and recommended practices which are revised and published every three years by NFPA.

The amendments to §34.511 establish a new specialized Type R license for the exclusive installing, certifying, or servicing of pre-engineered fixed fire extinguishing systems for residential cooking areas. The amendments also clarify that the Type PL license is required for the planning, supervising, certifying, installing, or servicing of all fixed systems other than pre-engineered systems and that the Type A license is required for certifying or servicing the installation of all fixed fire extinguisher systems other than pre-engineered systems and for installing, certifying, or servicing of all pre-engineered fixed fire extinguisher systems.

The amendment to §34.514 deletes the requirement for a Type A certificate of registration applicant and, in certain instances, the holder of a Type A certificate of registration subsequent to receipt of the original certification to provide statements of experience and educational information supporting the firm's qualifications to perform the duties permitted by the certificate of registration.

The amendment to §34.515 specifies the initial, renewal and late fees for the new Type R license consistent with the existing fees for similar licenses.

The amendment to §34.516 requires that an applicant for the new Type R license pass a test prior to issuance of the license and specifies that the test include questions on Article 5.43-1 of the Insurance Code and this subchapter.

The amendments to §34.517 clarify that licensed individuals authorized to certify pre-engineered fixed fire extinguishing systems, and not just Type A or Type PL licensees, may install, service or certify the type of fire extinguisher system as permitted by their respective license. Additionally, the amendments clarify that an individual employed by a registered fire extinguisher firm may install a fixed fire extinguisher system, other than a pre-engineered fixed system, without a license or permit if performed under the direct supervision of a Type A or Type PL licensee. The amendments to §34.517 also specify that after January 1, 2008, the design and equipment of all existing fixed fire extinguisher systems for the protection of commercial cooking areas must comply with the minimum standards of UL 300 or a red tag shall be attached. Additionally, amendments to §34.517 require that the design, performance and equipment for all dry chemical fire extinguishing systems, installed after January 1, 2006, meet the testing requirements of Underwriters Laboratory test standard UL 1254.

The amendment to §34.519 clarifies that a licensed individual may certify the type of fire extinguisher system as permitted under the individual's license.

The amendment to §34.520 specifies that after any service is performed on a fire extinguisher or fixed fire extinguisher system one of three types of tags must be attached to differentiate the status of the equipment.

The amendment to §34.521 clarifies that the three days within which a written notice of a red tag condition must be submitted to the owner and AHJ means three business days. Oral notification of the condition must still be made immediately to the owner and within 24 hours to the AHJ, where available.

New §34.524 sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of a yellow tag.

The adopted amendments and new sections are effective April 1, 2006.

General

Comment: One commenter supported the intent of proposed §34.517(e) but recommended a change in the current definition of "direct supervision" in §34.506(19). Certain fixed fire extinguishing systems such as foam fire suppression systems, installed on industrial plant large petroleum and chemical storage tanks consists of welded pipe supported by heavy structural steel and concrete. This work is overwhelmingly the majority of the labor necessary to install the system. This part of the work does not require fire protection expertise or fire protection oversight. This work is historically performed by welders, pipe fitters and laborers who have skills and extensive training in their respective task. Oversight is provided within the scope of the trade to ensure the work is accomplished according to engineering plans. It is not necessary for these employees to obtain a fire protection license as required in the proposed amendment. However, neither is it necessary to provide continual, direct on-site supervision by a licensed fire protection licensee as long as the fixed fire extinguisher engineered system is installed by a registered fire protection firm and certified by an appropriately licensed employee as required elsewhere in the rules. Therefore, the commenter recommended that to meet the intent of the proposed amendment to §34.517(e) the definition of "direct supervision" in §34.506(19) be amended as follows: "Work on dry foam pipe systems and on large industrial plant storage tanks and having piping larger than 2 1/2 inches in diameter may be installed without direct supervision provided the work is installed per the engineering drawings." Additionally, the commenter suggested that under the conditions of the amendment to §34.517(e), the exemption that an employee is not required to have a license should also extend to a permit. Therefore, the rule should reference both a license and permit for clarity.

Agency Response: The Department agrees and appreciates the commenter's recommendation. Although the commenter's recommendation is specific to fixed foam systems, the Department believes that the situation is similar for all fixed fire protection engineered systems. For this reason and in response to the comment, the definition of "direct supervision" in current §34.506(19) is amended to be consistent with the intent of the proposed amendment to §34.517(e). There is no change in the intent of the existing definition of the term "direct supervision" and this definition is retained to be applicable to all other non-engineered systems by modifying the current definition to add "pre-engineered" before "fixed fire extinguisher systems" and to add a provision to provide that "The licensee performing the direct supervision of an engineered fixed fire extinguisher system is not required to be on-site at all times when the work is performed." The department also agrees with the commenter that the exemption in the amendment to §34.517(e) should also apply to a permit and therefore added "and permit" at the end of the subsection for clarity.

For with changes: Zachry Construction Corporation, San Antonio, Texas.

The amendments and new section are adopted under Insurance Code Article 5.43-1 and §36.001. Insurance Code Article 5.43-1 §2 provides that the Commissioner of Insurance may adopt rules necessary for the administration of this article, including rules that adopt recognized standards such as, but not limited to, those of the National Fire Protection Association, those recognized by federal law or regulation, and those published by any nationally recognized standards-making organization, or the manufacturer's installation manuals. Under Article 5.43-1 §7, the Commissioner is required to adopt rules governing applications and qualifications for licenses, permits, and certificates issued under this article. Article 5.43-1 §8 provides that the Commissioner shall formulate and administer rules determined to be essentially necessary for the protection and preservation of life and property, specifically applicable to installing and servicing fixed fire extinguisher systems, including the examination of license applicants. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§34.506. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Apprentice--A person to whom a permit has been issued by the state fire marshal to perform various acts of service or installation while under the direct supervision of a person working for the same firm and holding a valid fire extinguisher service license to perform such acts.

(2) Business--The planning, certifying, installing, leasing, renting, selling, or servicing of portable fire extinguishers or fixed fire extinguisher systems.

(3) Certificate--The certificate of registration issued by the state fire marshal.

(4) Certify--To attest to the proper planning, installing, or servicing of portables and systems by attaching a completed service tag or other form required by a governmental authority.

(5) Commissioner--The commissioner of insurance.

(6) Department--The Texas Department of Insurance.

(7) DOT Specification Fire Extinguisher Cylinder--All fire extinguisher cylinders manufactured, tested and stamped with the specification number as required by the United States Department of Transportation.

(8) DOT Nonspecification Fire Extinguisher Cylinder--All fire extinguisher cylinders manufactured and tested but not stamped with a specification number as required by the United States Department of Transportation. These cylinders may be marked by a label with the words "Meets DOT Requirements."

(9) Installation--The initial placement of a portable or fixed fire extinguisher system or an extension or alteration after initial placement.

(10) License--The license issued by the state fire marshal to an employee of a registered firm.

(11) NFPA--The National Fire Protection Association, Inc., a nationally recognized standards-making organization.

(12) NICET--National Institute for the Certification in Engineering Technologies.

(13) Outsource testing service--The testing service selected by the state fire marshal to administer certain designated qualifying tests for licenses under this subchapter.

(14) Person--A natural person.

(15) Plan--To lay out, detail, draw, calculate, devise, or arrange an assembly of detection or suppression devices and appurtenances in accordance with either fire protection standards adopted in this subchapter or specifications specially designed by a Texas registered professional engineer acting solely in his professional capacity.

(16) Registered firm--A person, partnership, corporation, or association holding a current certificate of registration.

(17) Shop--A facility, whether at a specific location or in a mobile unit, of a registered firm where servicing, repairing, or hydrostatic testing is performed and where parts and equipment, which are required by this subchapter or in the adopted standards, are maintained.

(18) Test--The act of subjecting a portable or fixed system to any procedure necessary to determine whether it is properly installed or operates correctly.

(19) Direct supervision--The oversight by a licensee of the services performed by another licensee or permittee. The licensee, performing the direct supervision at the shop, must be present, at all times, on the premises where the supervised licensee or permittee is performing the service. When not at the shop the individual being supervised must be within sight of the licensee performing the direct supervision when installing or servicing portable fire extinguishers or pre-engineered fixed fire extinguisher systems. The licensee performing the direct supervision of an engineered fixed fire extinguisher system is not required to be on-site at all times when the work is performed.

§34.517. Installation and Service.

(a) The following requirements are applicable to all portable extinguishers.

(1) Portable extinguishers must be installed, serviced, and maintained in compliance with the manufacturer's instructions and with the applicable standards adopted in this subchapter.

(2) A service tag certifying the work performed must be securely attached by the licensee to the portable extinguisher upon completion of the work.

(3) When requested in writing by the owner, a portable fire extinguisher of the type described in subparagraphs (A), (B), and (C) of this paragraph may be serviced in accordance with the requirement of this subchapter, regardless of whether it carries the label of approval or listing of a testing laboratory approved in accordance with this subchapter.

(A) All portable fire extinguishers that are serviced in accordance with the requirements of the United States Coast Guard and installed for use in foreign shipping vessels;

(B) All portable carbon dioxide fire extinguishers that are serviced in accordance with the requirements of the United States Department of Transportation; or

(C) Cartridge actuated portable fire extinguishers used exclusively by employees of the firm owning the extinguishers.

(4) A licensee who services portable fire extinguishers in accordance with paragraph (3) of this subsection, shall comply with the following:

(A) The back of the service tag shall be plainly marked with the words "No Listing Mark".

(B) All missing markings, code symbols, instructions and information, required by the applicable performance standard and fire test standard specified in §34.507(1) of this subchapter (relating to Adopted Standards), except for the approving or listing mark of the testing laboratory, shall be affixed to each extinguisher in the form of a label designated in the standard.

(b) The following requirements are applicable to all fixed fire extinguisher systems.

(1) Fixed systems must be planned, installed, and serviced in compliance with the manufacturer's installation manuals and specifications or the applicable standards adopted in this subchapter.

(2) Upon completion of the installation of a pre-engineered fixed fire extinguisher system, a licensee authorized to certify pre-engineered fixed fire extinguishing systems under the provisions of this subchapter, must place an installation label on the system to certify that the system was installed in compliance with the manufacturer's installation manuals and specifications or standards adopted by the commissioner in this subchapter. The licensee whose signature appears on the installation label must be present for the final test of the system prior to certification.

(3) Upon completion of the installation of a fixed fire extinguisher system other than a pre-engineered system, a Type A or Type PL licensee must place an installation label on the system to certify that the system was installed in compliance with the manufacturer's installation manuals and specifications, plans developed by a Type PL licensee or professional engineer, or standards adopted by the commissioner in this subchapter. The licensee whose signature appears on the installation label must be present for the final test of the system prior to certification.

(4) A service tag certifying the work performed must be securely attached by the licensee to the system upon completion of servicing.

(c) Pre-engineered fixed fire extinguisher systems must be installed and serviced by a licensee authorized to install or service pre-engineered fixed fire extinguishing systems under the provisions of this subchapter.

(d) A pre-engineered fixed fire extinguisher system, except those covered by subsection (f) of this section, which has been previously installed in one location may be reinstalled in another location if:

(1) the system is of the size and type necessary to protect all hazards;

(2) all parts and equipment, when installed, will function as designed by the manufacturer; and

(3) the system shall comply with all applicable adopted standards.

(e) Fixed fire extinguisher systems other than pre-engineered systems must be planned, installed, or serviced by a Type PL licensee or professional engineer. Installation and servicing of such a system may also be performed by or supervised by a Type A licensee. An employee of the registered firm may install such systems, under the direct supervision of a Type A or PL licensee, without obtaining a license or permit.

(f) All pre-engineered fixed fire extinguishing systems, installed or modified after July 1, 1996, in accordance with NFPA 17 or NFPA 17A or NFPA 96 of the adopted standards, for the protection of commercial cooking areas, must meet the minimum requirements of Underwriters Laboratories, Inc., Standard 300, "Fire Testing of Fire Extinguishing Systems for Protection of Restaurant Cooking Area" (UL 300). After January 1, 2008 all existing pre-engineered fixed fire extinguishing systems, installed in accordance with NFPA 17 or NFPA 17A or NFPA 96 of the adopted standards, for the protection of commercial cooking areas, must meet the minimum requirements of Underwriters Laboratories, Inc., Standard 300, "Fire Testing of Fire Extinguishing Systems for Protection of Restaurant Cooking Area" (UL 300) or a red tag shall be attached following the procedures in §34.521 of this subchapter (relating to Red Tags).

(g) If the installation or servicing of a fixed fire extinguishing system includes the installation or servicing of any part of a fire alarm or detection system and/or a fire sprinkler system other than the installation and servicing of mechanical or pneumatic detection and/or actuation devices in connection with the fire extinguishing system, the licensing requirements of the appropriate Insurance Code Article 5.43-2 or 5.43-3 must be satisfied.

(h) The fixed temperature-sensing elements of the fusible metal alloy type, replaced while servicing a kitchen hood fire extinguishing system, must bear the manufacturer's date stamp which must be within one year of the date of the replacement.

(i) The disposable actuation cartridge, replaced while servicing a kitchen hood fire extinguisher system, must bear the date of replacement.

(j) After operating the pull pin or locking device during maintenance of a portable fire extinguisher, the flag of the new seal or tamper indicator shall bear the year it was attached.

(k) All pre-engineered dry chemical fixed fire extinguishing systems, installed in new, remodeled or relocated protected areas after January 1, 2006, must meet the minimum requirements of the second edition (1996) or more recent edition of Underwriters Laboratories, Inc., Standard 1254, "Pre-engineered Dry Chemical Extinguishing System Units".

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Department of Insurance
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SUBCHAPTER F. FIRE ALARM RULES

28 TAC §§34.606, 34.607, 34.610, 34.613, 34.615 - 34.617, 34.619 - 34.626

The Commissioner of Insurance adopts amendments to §§34.606, 34.607, 34.610, 34.613, 34.615 - 34.617, and 34.619, and new §§34.620 - 34.626, concerning fire alarm rules. Section 34.617 is adopted with changes to the proposed text as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7175). Sections 34.606, 34.607, 34.610, 34.613, 34.615, 34.616, and 34.619 - 34.626 are adopted without changes.

Insurance Code Article 5.43-2 §6 authorizes the Commissioner to appoint an advisory council to periodically review and recommend changes in the rules regulating fire detection and fire alarm systems. The members of the advisory council assisted in the review and formulation of the rules and recommended changes to the Commissioner. These amendments and new sections are necessary to update the regulations regarding the planning, certifying, leasing, selling, servicing, installing, monitoring, and maintaining of fire detection and fire alarm devices and systems. New §§34.620 - 34.626 are adopted simultaneously with the adopted repeal of §34.620 - 34.624, which also appears in this issue of the *Texas Register*.

The amendments to §34.606 add definitions of "full-time" and "full-time employment." Insurance Code Article 5.43-2 §5 requires a registered firm "to retain at least one" licensed individual as an employee at each office location. However, it has become apparent that some registered firms are not in compliance with the intent of the provision. Licensed individuals are working as employees of multiple firms and/or as employees of firms in different cities. To clarify the intent of the "one licensed employee" requirement, an amendment to §34.613 is adopted which requires at least one "full-time" licensed employee at each office location, and the term "full-time employment" is defined in adopted §34.606.

The amendments to §34.607 replace the current National Fire Protection Association (NFPA) standards with the most recent editions of those standards and maintain the minimum standards of design and performance of current technology for fire alarm systems. Additionally, other units of government in Texas are adopting these standards, and uniformity of standards enables the fire alarm industry and local fire officials to be more familiar with the content of the standard and consistently enforce the requirements that are applicable in the jurisdiction.

The amendment deleting the alarm monitoring requirements in §34.610 (Certificate of Registration) is to facilitate reader location of all alarm monitoring requirements in the rules. The requirements are relocated to a more appropriate section, §34.616, titled "Sales, Installation, and Service."

The amendment to §34.613, as previously noted, requires at least one full-time licensed individual to be located at each registered office to ensure closer proximity to the location of the installation. New §34.613(a)(6) clarifies some existing confusion regarding the need for entities that just monitor fire alarms to obtain a registration. Some entities that are not registered contract to provide monitoring services, but do not actually provide the monitoring service. A third party is retained to provide the monitoring service. The adopted rule provides that any entity billing for monitoring services is engaged in the business of monitoring and therefore must obtain a registration and maintain the required general liability insurance for that activity. Section 34.613(c)(2) is now consistent with the recent amendment to Insurance Code Article 5.43-2 §5C, which provides that a licensee with an unexpired license who is not employed by a registered firm at the time of the license renewal may renew that license. Currently, a licensee who is not presently employed cannot renew his/her license. Under the rules as adopted, the licensee is still prohibited from engaging in any activity afforded by the license until the licensee is employed by a registered firm.

The amendment to §34.615, which sets a one-year time frame for applicants to pass all testing requirements for obtaining a license, is to ensure that the applicant is familiar with the most current adopted codes, standards, rules, and statutes in effect when the license is issued.

The adopted amendment to §34.616(b) adds paragraph (5) that eliminates the requirement that the sale or lease of a fire alarm system is to be performed under the direct supervision of a residential fire alarm superintendent (RAS) licensee or fire alarm planning superintendent (APS) licensee. This change is made because the fire alarm system is required to be designed by one of these types of licensees. New §34.616(b)(5) is necessary to clarify the difference between "repair" and "installation" as applied to the replacement or upgrade of a fire alarm system. The installation of new or upgraded components often initiates a debate about whether the entire system must be brought into compliance with current codes. The adopted rule clarifies that the replacement of a component with a new comparable and compatible component is considered a repair, and therefore, the entire system does not have to meet current standards. However, under the adopted rule, the final decision will rest with the local authority having jurisdiction. New §34.616(b)(6) is needed to assist all interested parties when a customer changes his/her alarm monitoring from one registered firm to another. The registered firm is required to provide the passwords for the fire alarm control panel to the property owner upon request, so that another registered firm, hired by the owner to service the fire alarm system, may use the password without charging a substantial fee to reprogram the entire system or devices. As previously noted, §34.616(c)(1) - (4) contains the alarm monitoring requirements that are currently in §34.610. New §34.616(c)(5) is necessary to enable a responding fire department to obtain adequate information, including the phone number of the monitoring firm responsible for initiating the call and the monitoring firm contracted to provide the monitoring service if other than the actual monitoring firm. This will enable local fire departments to communicate with all parties involved in the monitoring and improve efficiency. New §34.616(c)(6) will eliminate the possible false sense of security by a property owner occurring when their alarm is no longer being monitored without their knowledge. The amendment requires a monitoring firm, if terminating the monitoring service before the end of the contract date, to notify a commercial property or a

multi-family unit customer and the local fire department at least seven days in advance of a cancellation of service.

The amendments to §34.617 are adopted to clarify that an installation certificate, except for a certificate for a one-or-two-family residence, must be completed not only after the installation of a system or single station detector unit but also after an addition or modification to a fire alarm system. By requiring the completion of the installation certificate in the format provided by the state fire marshal, other installation certificates required in any adopted standard are not needed; firms may reproduce the forms as needed rather than obtaining them from the State Fire Marshal's Office (SFMO). The proposed amendment to §34.617(2) required a copy of each completed installation certificate to be kept at the firm's office for the life of the system and accessible to the SFMO upon request. A minor change was also made in this section as adopted to correct a cross reference to §34.616(b)(4). One commenter expressed concern that keeping the installation certificates for the life of the system posed an undue burden on registered firms. The Department agrees that the proposed time period may be potentially excessive, so the amendment to §34.617(2) as adopted requires that the certificates must be kept for the life of the system or up to ten years, whichever occurs first. The changes do not introduce new subject matter or affect persons in addition to those subject to the proposal as originally published.

The amendment to §34.619(a) clarifies who can plan fire alarm systems. A licensed APS is permitted to plan any fire alarm system, and a licensed RAS may plan a one-or-two-family residential fire alarm system. The amendment to §34.619 that adds a new subsection (b) clarifies the use and purpose of a specific set of plans or drawings. The amendment modifies the form and content of the rubber stamp used to provide information on a plan, and a licensed planner, by marking the appropriate place on the stamped area of the plan, may differentiate between whether the plans are being submitted for review or as record drawings to the owner and whether the design complies with the applicable standards and codes or if the design is copied from an engineering plan. New §34.619(f) specifies the information that must be included in a fire alarm system plan for a one-or-two-family residence and requires that the registered firm retain the plans for at least one year to establish uniformity in the development of fire alarm plans for these types of occupancies and to ensure that the necessary information is recorded for access by the owner or authority having jurisdiction.

The new certification process for one-or-two-family residences, in adopted new §34.620, is intended to reduce the paperwork handling by the installing firm and reduce the cost of the system to the consumer. Currently, a certification document is delivered to the owner; a copy is forwarded to the state fire marshal, and a copy is retained by the installing firm. The new certification label has an adhesive back and must be posted at the residence and will serve as an easily accessible record copy for the homeowner or other interested parties.

New §34.621(a) and (b) are needed to clarify the proper use of service labels on systems. It is currently unclear whether a service label can be attached with a yellow or red label indicating a troubled system. Adopted §34.621(a) - (c) specifies that after any service, a service label should always be attached, and, if the condition of a previously attached yellow or red label is corrected, the yellow or red label is to be removed. New §34.621(d) is necessary to specify that service labels should remain on the panel for at least two years; currently, the rules do not specify any duration. New §34.621(e) is needed to assist local officials in recognizing the condition of a system. Currently, local fire officials inspecting a building assume a green label implies that the system has been thoroughly inspected by a licensee and is in good working order when actually it only implies that some service was performed. Section 34.621(e) changes the color of the service label from green to white. New §34.621(g) is to provide guidance as to the actual placement of service labels. In some cases labels are placed side-by-side occupying the entire area inside the door of a fire alarm panel and covering important instruction labels placed there by the panel manufacturer. Section 34.621(g) specifies that only the top one-half inch of the adhesive on the back should be used and that each label should be attached over the previous service label. New §34.621(i) advises the licensee of some of the requirements in the rules regarding the use of service labels and adds instructions on the label where currently there are none.

New §34.622 is another effort to assist local fire officials to determine the status of a system. Currently, one of the critical issues checked by a local fire official, inspecting the building, is to determine if the fire alarm system has been thoroughly inspected by a licensee within the past year. The only current method to indicate that an inspection has been performed is to use a service label that may be removed or replaced after subsequent service is performed. The new §34.622 sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of an inspection label. Check blocks on the new label, which must be completed by the inspecting licensee, help identify the type of inspection performed and the status of the system at that time so the local fire official can take the appropriate corrective action as needed.

New §34.623 is another effort to assist local fire officials to determine the status of a system. It sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of a yellow label.

New §34.624 is also another effort to assist local fire officials to determine the status of a system. It sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of a red label. The new label provides a space to indicate if the system is either inoperable or impaired or in a fault condition and includes brief instructions on its use.

New §34.625 addresses investigations and enforcement actions for noncompliance with the rules as well as possible sanctions for such noncompliance.

New §34.626 is necessary to express the Department's intent for the continuation of non-affected provisions of the rules if any provisions are declared invalid for any reason.

The amendments to §34.606 add definitions of "full-time" and "full-time employment" to clarify adopted §34.613 which requires at least one full-time licensed employee at each office location.

The amendments to §34.607 adopt by reference certain standards and recommended practices of the National Fire Protection Association (NFPA). The amendments replace the current standards with the most recent editions of those standards that are revised and published by the NFPA every three years. Additionally, the amendments require that a copy of the adopted standards be maintained at the State Fire Marshal's Office for public viewing.

The amendments to §34.610 delete the monitoring requirements from that section; the requirements are relocated to the more appropriate §34.616.

The amendments to §34.613 require at least one full-time licensed individual to be located at each registered office and clarify that firms that bill for monitoring services are engaged in the business of monitoring and therefore must maintain the required general liability insurance for that activity. The amendments also provide that a licensee with an unexpired license who is not employed by a registered firm at the time of the license renewal may renew that license; the licensee, however, is prohibited from engaging in any activity afforded by the license until the licensee is employed by a registered firm.

The amendment to §34.615 requires that an applicant for a license complete and submit all application requirements within one year of the successful completion of any test required for a license or the test is voided.

The amendments to §34.616 delete the requirement that the sale or lease of a fire alarm system must be performed under the direct supervision of a residential fire alarm superintendent (RAS) licensee or fire alarm planning superintendent (APS). Additionally, the amendments clarify the difference between the terms "repair" and "installation" as applied to the replacement or upgrade of a new fire alarm control panel and require the fire alarm servicing firm to provide the passwords for the fire alarm control panel to the property owner upon request. Additionally, the amendment to the monitoring requirement in §34.616(c)(5) requires the monitoring firm to provide, on request, the call-back phone number of the firm contracted to provide the monitoring service if other than the monitoring firm. Section 34.616(c) is also amended to add a requirement that a monitoring firm, if terminating the monitoring service before the end of the contract date, must notify the customer at least seven days in advance to make the customer aware that the fire alarm system is not being monitored.

The amendments to §34.617 clarify that an installation certificate except for a certificate for a one-or-two-family residence shall be completed not only after the installation of a system or single station detector unit but also after an addition or modification to a fire alarm system. Additionally, the adoption requires the completion of the installation certificate in the format provided by the state fire marshal to be used in certain instances in place of any other installation certificate required in an adopted standard. The amendments permit fire alarm firms to reproduce the forms as needed rather than requiring the firms to obtain the forms from the SFMO. Additionally, the adoption requires a copy of each completed installation certificate to be kept at the firm's office accessible to the SFMO upon request.

The amendments to §34.619 clarify that not only is a licensed APS permitted to plan a fire alarm system, but also a licensed RAS may plan a residential fire alarm system. Additionally, the amendments modify the form and content of the rubber stamp used to provide information on a plan. The amendments also specify the information that must be included on a fire alarm system plan for a one-or-two-family residence.

Section 34.620 sets forth specific criteria regarding the color, content, placement, duration, use, and procedures concerning the application of installation labels and differentiates the label format between a label used for the installation of a fire alarm system in a commercial building or non-one-or-two-family residence and a label used for the installation of a fire alarm system in a one-or-two-family residence. The label for the commercial building or non-one-or-two-family residence, which is required to be retained on the inside of the fire alarm control panel for the life of the system, records the name of the firm, registration number and date on which the fire alarm system is installed and the name and license number of the authorized licensee. The label for the one-or-two family residence contains the same information and also includes certification that the system or equipment complies with applicable laws and standards.

Section 34.621 sets forth specific criteria regarding the color, content, placement, duration, use, and procedures concerning the application of service labels. The service label records the name, address, phone number and registration number of the firm and the name and license number of the individual providing the service and the date and list of the services provided.

Section 34.622 sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of an inspection/test label. The blue inspection/test label records the name, address, phone number and registration number of the firm, the name and license number of the inspector performing the inspection, the type and date of the inspection or test and the system status after the inspection or test.

Section 34.623 sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of a yellow label. The yellow label records the name, address, phone number and registration number of the firm, the name and license number of the individual attaching the label and the list of conditions that result in the fire alarm system being out of compliance with applicable codes and standards.

Section 34.624 sets forth specific criteria regarding the color, content, placement, duration, use and procedures concerning the application of a red label. The red label records the name, address, phone number and registration number of the firm, the name and license number of the individual attaching the label and the list of conditions that have caused the fire alarm system to be inoperable, impaired, or to have a fault condition.

Section 34.625 addresses investigations and enforcement actions for noncompliance with the rules as well as possible sanctions for such noncompliance.

Section 34.626 provides for the continuation of non-affected provisions of the rules if any provisions are declared invalid for any reason.

The adopted amendments and new sections are effective April 1, 2006.

General.

Comment: One commenter recommended deleting proposed §34.613(a)(4). Large firms may have multiple branch offices which may sell other non fire alarm products. These large firms do not need a licensee at each branch office because they can provide a licensed individual to the office as needed. Additionally, technical individuals can be provided from elsewhere in the U.S. Because large firms would have to hire individuals that they do not currently employ, this would provide an undue competitive advantage to small companies that lack the ability to provide the customer support that large firms can provide.

Agency Response: The Department disagrees. This rule would not provide a competitive advantage because only offices that provide fire alarm services are required to obtain a branch of-

fice registration and have at least one licensed individual. The quantity and distribution of branch offices in Texas providing fire alarm services is a business decision by the registered firm and is not based on the size of the firm.

Comment: The same commenter recommended deleting proposed §34.613(a)(6) because this requirement would exclusively benefit the small burglar alarm companies that currently monitor their own residential customer base. Many large firms either own and operate or employ a UL listed central monitoring station as part of a fire alarm service contract with no intention of providing the monitoring from the branch location that provides the service, or even by their own firm at all, because the National Fire Alarm Code authorizes that. This proposed change merely increases the cost of many large firms to do business, giving a legalized, unfair advantage to the very segment of the fire alarm industry that tends to oppose higher professional standards, and stricter codes that benefit the safety of our fellow Texans.

Agency Response: The Department disagrees. This rule will not affect either large or small registered firms that currently own or operate central stations because they already carry the required insurance. The required insurance is issued for the registered firm, not for each branch office. The insurance requirements in Insurance Code Article 5.43-2 applies to all firms providing fire alarm monitoring services. The proposed rule clarifies that firms billing for fire alarm monitoring service are providing monitoring service and therefore are required to carry this insurance.

Comment: The same commenter recommended deleting proposed §34.615(e) because this proposal would allow a completely unqualified individual to function as an Alarm Planning Superintendent for one year, take the test again, and function for another year as an unqualified Alarm Planning Superintendent.

Agency Response: The Department disagrees. An individual is not issued a license and cannot function as an Alarm Planning Superintendent until the individual passes all required tests and meets all other application requirements.

Comment: The same commenter recommended deleting proposed §34.616(b)(1) and retaining the requirement for a licensee to supervise the sale of fire alarm systems. The result of adopting this proposed rule would be the sales of fire alarm systems in Texas by unlicensed, unsupervised individuals.

Agency Response: The registered fire alarm firm is responsible for the sales and completed installation of a fire alarm system. Since the fire alarm rules currently require that all fire alarm systems must be designed by a licensed professional, installed under the supervision of a licensee, and certified by a licensee, the fire alarm advisory council concluded that there is sufficient oversight by licensed individuals of the final installed system and the requirement that a licensee must supervise the sale of fire alarm systems is not necessary.

Comment: The same commenter recommended deleting proposed §34.616(b)(5). This proposed rule removes from every legislative body in Texas, including the state legislature, the ability to adopt effective building and fire codes, because this rule would supersede every fire code in Texas. Adoption of this change would ensure that the occupants of older high-rise occupancies would never have a fire alarm system that meets the current code because no alterations to meet new audibility or visual notifications requirements would ever be required.

Agency Response: The Department disagrees. The proposed rule does not supersede the state legislature or any fire code in Texas. Insurance Code Article 5.43-2 §3(a)(2) states in part "...that a municipality or county shall have the right to. . . require a better type of alarm or detection system. . . than the minimum required by state law." In addition, the last sentence of the proposed rule clearly states that the local authority having jurisdiction shall be consulted to determine if the system should be upgraded to the current code.

Comment: The same commenter recommended deleting proposed §34.617(2) since fire alarm system codes do not require the retention of any records; records will be lost if the certifying firm ceases its operation; and the "life of the system" is indefinite.

Agency Response: The Department agrees in part with the commenter and therefore has changed the retention period from the "life of the system" to the "life of the system or ten years whichever occurs first." Although the records maintained by the firm may be lost when a firm ceases operation, copies of the certificate provided to the property owner and the local authority having jurisdiction may still exist.

Comment: The same commenter recommended deleting proposed §34.619(b). The commenter opined that the Fire Alarm System submittal drawings approved by this rule are nothing more than bid documents with hand written notes attesting to alleged code violations. This is in contradiction to the requirements in most Building and Fire codes and NFPA 72.

Agency Response: The Department agrees that this rule permits a registered firm to copy plans designed and sealed by a professional engineer (bid documents), to list all possible code violations on the plans and to submit them for evaluation to an authority having jurisdiction prior to commencement of the installation. This method clearly solicits a response from the authority having jurisdiction, who is reviewing the plans, on whether the fire alarm system should be installed as planned and sealed by the engineer or if the list of possible code violations should be remedied. This is the intent of the rule. Either way, a registered fire alarm firm is required to install the system in compliance with the adopted standards.

Comment: The same commenter recommended deleting proposed §34.619(c). The requirements for record drawings stated in the current rule duplicates the standards of both fire and building codes and NFPA 72. There is no reason to change the current language, and the proposed change provides no enhanced value.

Agency Response: The Department disagrees. The proposed rule deletes the limited list of details to be shown on record drawings and requires the record drawings to include all the details in accordance with the applicable codes. The rule is also amended to require that a description of the system's sequence of operation, which may not be required by all applicable codes, be provided with the record drawings.

Comment: The same commenter recommended deleting proposed §34.619(f). It is inconsistent to keep record drawings for one year, while the certificate, certifying the system, is required to be kept for the life of the system. This proposal also fails to address commercial property entirely.

Agency Response: The Department disagrees. This rule is not inconsistent because the requirement to retain record drawings for one year applies only to one-or-two family dwellings, and the certificate retention in §34.617 applies only to commercial facili-

ties. The commenter is correct that neither the existing rules nor the amended rules specify the length of time that record drawings must be kept for commercial buildings. Since no recommendations were made by the public relevant to retention of record drawings for commercial buildings, the advisory council chose not to address this issue.

Comment: The same commenter recommended reinserting the following text between the words "location" and "yellow" in proposed §34.620(a) as it appears in the current rule: "If the installation is deficient in any respect that might otherwise require a yellow or red service tag, the installation shall be deemed incomplete and no installation label shall be affixed until all deficiencies are corrected."

Agency Response: The Department disagrees. Many existing fire alarm systems have a yellow label attached. This condition may be acceptable to the authority having jurisdiction. If a modification is made to the system, an installation label should be attached identifying the firm that did the modification. The commenter's recommendation to retain the current language does not allow for this important record. The current language has been a major point of confusion by both fire alarm firms and local fire marshals and is revised for clarity.

Comment: The same commenter recommended deleting proposed §34.621(b) because if the provided service does not correct all outstanding deficiencies there would be confusion regarding what tag to attach inside the fire alarm control panel.

Agency Response: The Department disagrees. The rule states that after any service, a service label should be attached. Each time a deficiency is corrected, another service label is attached to record the work performed or deficiency corrected. If deficiencies are corrected the yellow or red label is removed, thereby indicating one less deficiency. Reviewing the information on these labels provides the inspector with the current status and brief past history of the alarm system.

Comment: The same commenter recommended deleting proposed §34.621(c) because it is difficult to know the difference in code requirements for an older system.

Agency Response: The Department disagrees. This is not a new requirement; it is just relocated to this section. It has been in effect for many years. Since no recommendations were made by the public to delete or amend this rule, the advisory council retained the current rule.

Comment: The same commenter recommended deleting proposed §34.621(d). If the service has not been corrected in two years, an inspector from the local authority having jurisdiction will not know if a deficiency has been corrected.

Agency Response: The Department disagrees. Outstanding deficiencies are noted on yellow and red labels and reported in writing to the property owner and the local authority having jurisdiction. After a deficiency has been corrected, the respective red or yellow label is removed. The absence of red or yellow labels indicates deficiencies have been corrected. In addition, after the annual system inspection/test, the new blue inspection/test label must be attached. The inspection/test label has a specific space to indicate if there are outstanding code discrepancies which require a yellow or red label or if the system was found to be acceptable.

Against: One individual.

For with changes: One individual.

The amendments and new sections are adopted pursuant to Insurance Code Article 5.43-2, §4 and §6, and §36.001. Article 5.43-2, §4 authorizes the Commissioner of Insurance to issue rules and regulations considered necessary to the Commissioner's administration of Article 5.43-2 through the State Fire Marshal and, in promulgating necessary rules and regulations, to utilize recognized standards such as, but not limited to, those of the National Fire Protection Association, the National Electrical Code, those recognized by federal law or regulation, those published by any nationally recognized standards-making organization, or any information furnished by individual manufacturers. Article 5.43-2, §6 provides that the Commissioner of Insurance may adopt rules as necessary for the administration of this article and requires the Commissioner to adopt standards applicable to any fire alarm device, equipment, or system regulated under this article. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§34.617. Certification.

After completion of the installation, modification, or addition of a system or single station detector unit, except for a one-or-two-family residence, the licensee shall complete an installation certificate in the format provided by the state fire marshal in lieu of the installation form required by the adopted standard unless required otherwise by the local authority having jurisdiction. The format for the installation certificate shall be provided by the SFMO on request. The certificate shall be presented to the owner or the owner's representative or posted near the main control panel. The installation certificate shall identify the standards applicable to the installation and certify compliance with such standards, unless variance is permitted in §34.616(b)(4) of this title (relating to Sales, Installation, and Service), in which event the specific variance and authority for such variance shall be identified. The information and format of the installation certificate shall be determined by the state fire marshal. When an installation certificate form has been completed, legible copies shall be distributed as follows:

(1) original at the site of installation after completion of the installation;

(2) one copy retained for the life of the system or ten years, whichever occurs first, by the certifying company for access by the State Fire Marshal's Office; and

(3) one copy to be sent within 10 days after completion of installation to the local authority having jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2006.

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Gene C. Jarmon
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Texas Department of Insurance
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For further information, please call: (512) 463-6327

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28 TAC §§34.620 - 34.624

The Commissioner of Insurance adopts the repeal of §§34.620 - 34.624, concerning regulation of fire alarms. The repeal of these sections is adopted without changes to the proposal as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7183).

Insurance Code Article 5.43-2 §6 authorizes the Commissioner to appoint an advisory council to periodically review and recommend changes in the rules regulating fire detection and fire alarm devices and systems. The members of the advisory council assisted in the review and formulation of these rules and recommended changes to the Commissioner. It is necessary to repeal §§34.620 - 34.624 to allow for the adoption of amendments and new sections to update the regulations regarding the planning, certifying, leasing, selling, servicing, installing, monitoring, and maintaining of fire detection and fire alarm devices and systems. Notice of the simultaneous adoption of new §§34.620 - 34.626 is also published in this issue of the *Texas Register*.

The repeal of these sections is effective April 1, 2006.

The repeal allows for the adoption of new §§34.620 - 34.624 that reorganize and renumber the sections and provide for the addition of new rules.

The Department did not receive any comments on the proposed repeal.

The repeal of the sections is adopted pursuant to Insurance Code Article 5.43-2 §6 and §36.001. Article 5.43-2 §6 provides that the Commissioner of Insurance may adopt rules necessary for the administration of this article. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. FIRE SPRINKLER RULES

28 TAC §§34.706, 34.707, 34.710, 34.711, 34.713, 34.714, 34.716 - 34.725

The Commissioner of Insurance adopts amendments to §§34.706, 34.707, 34.710, 34.711, 34.713, 34.714, 34.716, 34.717, and new §§34.718 - 34.725, concerning regulation of fire protection sprinkler systems. The amendments and new sections are adopted without changes to the proposed text as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7184).

Insurance Code Article 5.43-3 §6 provides for the creation of the Fire Protection Advisory Council (Council) to advise and recommend changes in rules regulating fire protection sprinkler systems. The members of the Council assisted in the review of the fire protection sprinkler rules and recommended changes. The amendments and new sections are necessary to implement the recommendations of the Council and to update regulations regarding planning, installation, inspecting and servicing of fire protection sprinkler systems. The adoption reorganizes the current regulations into a more orderly format and mandates new installation tags and new inspection, testing and maintenance service (ITM) tags. The adopted amendments and new sections make it easier for those involved in planning, installation, inspecting and servicing of fire protection sprinkler systems to quickly locate the requirements and for those involved in enforcement, to more accurately and consistently enforce the sections. This adoption is simultaneous with the adoption of the repeal of §§34.718 - 34.723 which is also published in this issue of the *Texas Register*.

The amendments to §34.706 add terms and definitions which are necessary for consistency with nationally recognized standards. The amendments are also needed to delineate the different types of service performed and the conditions that constitute an emergency impairment status for a fire sprinkler system. This will enable a service technician to determine the appropriate tag (installation, service, ITM, yellow, or red tag) to attach to the system riser after the servicing of a fire sprinkler system.

The amendments to §34.707, which replace the current National Fire Protection Association (NFPA) standards with the most recent editions of those standards, are necessary to maintain the minimum standards of design and performance of current day technology for fire sprinkler systems to provide a greater level of safety to the public who rely on the performance of these systems. Additionally, other units of government in Texas are adopting these standards, and uniformity of standards enables the State Fire Marshal's Office, the fire sprinkler industry and the local fire officials to be more familiar with the content of the standard and consistently enforce the requirements that are applicable in the jurisdiction. Four standards, NFPA 231, NFPA 231C, NFPA 231D and NFPA 231F, are deleted from the current rules because they were re-codified into the NFPA 13 standard, which is adopted in this section.

The amendment to §34.710(g), which deletes the requirement to surrender a void certificate of registration after an administrative revision and prior to issuance of a new registration, is needed because the requirement places an unnecessary burden on the registered firm and delays the issuance of the new registration. The amendment to §34.710(i)(3) is necessary to clearly state the intent of the existing rule which is to prohibit firms holding a Certificate of Registration for Underground Fire Mains from planning these systems.

The amendments to §§34.711(g)(4), 34.713(b)(2)(D), and 34.714(d)(5), set forth the scope, fees and qualifications for a new RME-General Inspector license, and amendments to §34.716(c) require that after January 1, 2008, the inspection, test and maintenance of fire sprinkler systems be performed by a licensee. Currently there are no qualifications for individuals performing this service. These amendments are necessary to ensure that individuals performing this service meet minimum qualifications and are accountable for the performance of the service. This will increase the likelihood that the fire protection

sprinkler systems will perform as intended when the public is at risk.

The amendments to §34.713 delete subsection (a)(7)(D), (E) and (F) concerning the identification of the insured on the required certificate of insurance and combine them into subsection (a)(7)(B), to remove outdated and extraneous language and clearly indicate what information is required.

Section 34.713(b)(2)(B) is amended to delete the requirement for the completion of a course, approved by the SFMO on the planning, inspection and installation of an NFPA 13D dwelling fire protection sprinkler system, to obtain an RME-Dwelling license. This is necessary because the course is not regularly offered which delays or prevents applicants from obtaining a license in a timely manner.

Section 34.714(d)(1)(e) is amended to correct an error in the amount of the renewal late fee for a sprinkler contractor certificate of registration. This is necessary to comply with the statutory fee guidelines in Insurance Code Article 5.43-3 §4(a).

Section 34.716(b)(2) is amended to require a firm installing a fire protection sprinkler system to retain a copy of the Contractor's Material and Test Certificate in a separate file at its place of business in lieu of mailing the copy of the certificate to the State Fire Marshal's Office. This change reduces the cost, handling, and processing time of the registered firm and SFMO's staff but still provides for the retention of a record of the activity.

Section 34.716(g) and (h) require a firm to employ at least one full-time Responsible Managing Employee (RME) at each business office where fire protection sprinkler system planning is performed. The RME is responsible for directly supervising the planning of the system which must be in accordance with adopted codes and standards. Therefore, it is necessary that the RME be in close proximity to where the system is planned in order to ensure appropriate supervision of the planning.

New §34.716(i) provides that the planning, installation or servicing of all fire protection sprinkler systems must comply with the standards in §34.707 or a more recent edition of that standard that is adopted by the political subdivision in which the fire sprinkler system is installed. When a local jurisdiction adopts a more recent edition of the state adopted code, a registered sprinkler firm may not know which code to follow. This amendment clarifies that the system can comply with the code adopted by the political subdivision.

The amendments to §34.717(c) require that an RME sign and certify at least one set of plans submitted to the authority having jurisdiction and one set of the as-built plans provided to the building owner using the plan stamp specified in §34.717(d). This requirement is needed to ensure that the plans are reviewed by the licensed RME and that the RME certifies that the plans comply with the adopted NFPA standards prior to being submitted to the local fire marshal and that the system has been installed accordingly. The specified plan stamp is necessary to ensure consistent format and available information.

New §34.718 sets forth specific criteria and procedures for an installation tag. The main purpose of this tag is to record the pressure and flow data of the water supply at the time a fire protection sprinkler system is installed. This initial data is needed to compare with subsequent annual measurements, taken by service technicians, to determine if the water supply characteristics have diminished below the minimum levels required.

New §34.719 sets forth specific criteria and procedures for a service tag. The main purpose of this tag is to record the type of service performed; whether any deficiencies, identified by a red or yellow tag, have been corrected; who performed the service; and when the service was performed and the tag attached. The tag is required to be attached to the fire sprinkler system and retained for five years in order to maintain a brief history of the work performed. This history is necessary to enable service technicians and local fire marshals who perform subsequent inspections to analyze the system and determine any negative trends that may need corrective action.

New §34.720 sets forth specific criteria and procedures for the inspection, testing and maintenance (ITM) tag. The main purpose of the ITM tag is to record the type of annual ITM performed, the system status, the main drain test results, identify who performed the service, when the service was performed and the tag attached. The tag is required to be attached to the fire protection sprinkler system and to be retained for five years in order to maintain a brief history of the work performed. This history is necessary to assist service technicians in determining whether certain maintenance was performed on schedule. The tag is also needed as a visible indication to local fire marshals that the ITM was performed annually and in compliance with local codes and that the status of the system and the water supply is acceptable.

New §34.721 sets forth specific criteria and procedures for a yellow tag. The main purpose of the yellow tag is to record the description of impairments in which the fire sprinkler system is not compliant with the adopted standards and to identify who performed the service or inspection and when the service or inspection was performed and the tag attached. The tag is also needed to assist service technicians and the local fire marshal in identifying which fire sprinkler system is impaired and in taking the appropriate corrective action.

New §34.722 sets forth specific criteria and procedures for a red tag. The main purpose of the red tag is to record the description of an emergency impairment for a fire protection sprinkler system and to identify who performed the service resulting in the identification of the emergency impairments and when the service was performed and the tag attached. The tag is also needed to assist service technicians and the local fire marshal in identifying which fire sprinkler system is impaired and in taking the appropriate corrective action.

New §§34.723 - 34.725, which address enforcement, administrative actions and severability, replace and are substantively the same as former §§34.721 - 34.723 which were repealed in order to reorganize and renumber the sections in Subchapter G for consistency and ease in use.

The amendments to §34.706 add definitions for terms that are consistent with those in the nationally recognized standards.

The amendments to §34.707 adopt by reference certain standards and recommended practices of the National Fire Protection Association (NFPA). The amendments replace the currently adopted (national) standards with the most recent editions of those standards which are published by the NFPA every three years.

The amendment to §34.710(g) deletes the requirement to surrender a void certificate of registration after an administrative revision and prior to issuance of a new registration. The amendment to §34.710(h) clarifies that the holder of a Certificate of Registration for Underground Fire Mains is not permitted to plan the underground fire protection sprinkler system piping.

The amendment to §34.711(g) establishes an RME-General Inspector license and specifies the purpose of the license.

The amendments to §34.713 delete outdated and extraneous language concerning the identification of the insured on the required certificate of insurance by rewording subsection (a)(7)(D), (E) and (F) and combining them into subsection (a)(7)(B). The amendments also delete the requirement to submit evidence of successful completion of a course approved by the SFMO on the planning, inspection and installation of an NFPA 13D dwelling fire protection sprinkler system for those applying for an RME-Dwelling license. Further, the adopted amendments set forth the minimum technical testing requirements necessary to obtain the RME-General Inspector license.

The amendments to §34.714 specify the initial and renewal fees for the RME-General Inspector license. Additionally, the adoption corrects the error in the amount of the specified renewal late fee for a non-specialized sprinkler certificate of registration that is expired for longer than 90 days but less than two years.

The amendments to §34.716 add the requirement that the registered installing firm retain a copy of the Contractor's Material and Test Certificate at its place of business for the life of the sprinkler system and make the certificate accessible to a representative of the SFMO upon request. The amendments also require that after July 1, 2008, the inspection and testing of all fire sprinkler systems, except one- and two-family dwelling or underground systems, must be done by an individual holding the RME-General Inspector license or the RME-General license. The amendments also clarify the intent of the subchapter by providing that the planning, installation or servicing of all fire sprinkler systems must comply with the standards in §34.707 or a more recent edition of the standard that is adopted by the political subdivision where the fire sprinkler system is to be installed. Additionally, the amendments require that each registered firm must employ at least one full-time RME-General or RME-Dwelling licensee at each business office where fire protection sprinkler system planning is performed, who is appropriately licensed to conduct the business performed therein, and that the RME directly supervise the design and layout of the automatic fire sprinkler system.

The amendments to §34.717 require that an RME sign with an original signature and certify, using the stamp specified in subsection (d) of this section, at least one set of plans submitted to the authority having jurisdiction for review, rating, permit, or record purposes and at least one set of as-built plans provided to the building owner.

New §34.718 sets forth specific criteria regarding the color, content, placement, duration, use and procedures for the application of an installation tag. This tag is used to record the name of the firm, registration number and date on which the fire protection sprinkler system was installed. The tag also contains critical information concerning the pressure and flow characteristics of the water supply at the time the system was installed and must remain on the system for the life of the system.

New §34.719 sets forth specific criteria regarding the color, content, placement, duration, use and procedures for the application of a service tag. The service tag when completed will indicate the name, address, phone number and registration number of the servicing firm; the applicable RME's name and license number; the signature of the service person; the type of work (service, remodel, or other); the list of services performed; and the dates that any yellow tag or red tag conditions were corrected.

New §34.720 sets forth specific criteria regarding the color, content, placement, duration, use and procedures for the application of an ITM tag. The ITM tag records the name, address, phone number and registration number of the firm; the name and license number of the inspector performing the ITM; the type and date of the ITM performed; the system status after the ITM; and the water supply pressure and flow characteristics determined by the main drain test.

New §34.721 sets forth specific criteria regarding the color, content, placement, duration, use and procedures for the application of a yellow tag. The yellow tag records the name, address, phone number and registration number of the firm; the name and license number of the Responsible Managing Employee completing the information on the tag; and the list of impairments that are not compliant with NFPA standards.

New §34.722 sets forth specific criteria regarding the color, content, placement, duration, use and procedures for the application of a red tag. The red tag records the name, address, phone number and registration number of the firm; the name and license number of the respective Responsible Managing Employee completing the information on the tag; and the emergency impairments.

New §34.723 and §34.724 address enforcement actions and administrative actions for failure to comply with the provisions of Subchapter G and the provisions of Insurance Code Article 5.43-3. New §34.725 provides that if any provision of Subchapter G is held invalid for any reason the remaining provisions of Subchapter G that can be given effect without the invalid provisions shall remain in effect and continue to apply.

The adopted amendments and new sections are effective April 1, 2006.

The Department did not receive any comments on the proposed amendments and new sections.

The amended and new sections are adopted pursuant to Insurance Code Article 5.43-3 and §36.001. Insurance Code Article 5.43-3, §3 and §7 provide that the Commissioner of Insurance may adopt rules necessary for the administration of this article, and §4 authorizes the Commissioner to prescribe applicable fees. Article 5.43-3, §3(a) provides that the rules may create a specialized licensing or registration program for fire protection sprinkler system contractors. Article 5.43-3, §3(b) provides that the Commissioner in adopting necessary rules may utilize recognized standards such as those adopted by a federal law or regulation or those published by nationally recognized standards-making organizations, or those developed by individual manufacturers. Article 5.43-3, §7(a)(1) provides that the rules address the registration of a person or organization engaged in the business of planning, selling, installing, maintaining, or servicing fire protection sprinkler systems, and §7(a)(2) provides that the rules address the requirements for the plan, sale, installation, maintenance, or servicing of fire protection sprinkler systems. Article 5.43-3, §4(i) authorizes the Commissioner to prescribe fees for registration and licensing that are within the limits specified in §4. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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28 TAC §§34.718 - 34.723

The Commissioner of Insurance adopts the repeal of §§34.718 - 34.723, concerning regulation of fire protection sprinkler systems. The repeal of these sections are adopted without changes to the proposal as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7191).

Insurance Code Article 5.43-3 §6 creates the Fire Protection Advisory Council (Council) to advise and recommend changes in the rules regulating fire protection sprinkler systems. The repeal of §§34.718 - 34.723 is necessary to implement the recommendations of the Council and to enable the adoption of new rules to update regulations regarding planning, installation, inspecting and servicing of fire protection sprinkler systems. The adoption of the new rules will make it easier for fire protection sprinkler contractors and fire officials to quickly locate the regulatory requirements as well as for fire officials to accurately enforce the sections. Notice of the adoption of new §§34.718 - 34.725, concerning the same general subject matter and concerning new installation and inspection labels, is also published in this issue of the *Texas Register*.

The repeal of these sections is effective April 1, 2006.

The repeal of these sections allows for the adoption of new §§34.718 - 34.723 that reorganize and renumber the sections and provide for the addition of new rules.

The Department did not receive any comments on the proposed repeal.

The repeal of the sections is adopted pursuant to the Insurance Code Article 5.43-3 and §36.001. Article 5.43-3 §3 provides that the Commissioner of Insurance may adopt rules necessary for the administration of this article. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER A. GENERAL PROVISIONS

34 TAC §31.2

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts amended §31.2, concerning changes to employers' reporting of employed retirees. The amended section is adopted without changes to the text of the proposal as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7195).

TRS currently requires employers to report the employment of retirees for purposes of administering laws governing employment after retirement. The amendments to §31.2 will allow TRS to implement new §824.6022, Government Code, which requires employers to file a monthly certified statement of employment of retirees and makes the failure of an administrator to do so an offense. The amendments broaden the scope of the required report to include information about the payment of the employer pension surcharge and health benefit surcharge. The amended section requires TRS-covered employers to report the number retirees working in TRS-covered positions, the total amount of salary paid to employed retirees who are not exempt from the pension surcharge, and the total amount of any pension or health benefit surcharge paid.

The amended rule also adds a reference to the new exception for employment-after-retirement purposes for faculty members of professional nursing programs to other such exceptions listed in the rule. This addition is needed to ensure employers provide TRS sufficient information to determine if the exception for professional nursing program faculty applies to a given individual.

TRS received no public comments regarding the proposed amendments.

Statutory Authority: Government Code, §824.601, which authorizes the Board to adopt rules necessary for administering laws in Government Code, Chapter 824, Subchapter G, concerning loss of benefits on resumption of service, including §824.601 and §824.6022; and Government Code, §825.102, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

Cross-reference to Statute: Government Code, §824.601, which provides for loss of annuity by any service or disability retiree who works for a TRS-covered employer unless such employment is exempted by law from forfeiture of annuity; and Government Code, §824.6022, which requires employers to file a monthly certified statement of employment of retirees and makes

it an offense for an administrator who is responsible for filing such a statement to knowingly fail to do so.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
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For further information, please call: (512) 542-6438

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SUBCHAPTER B. EMPLOYMENT AFTER SERVICE RETIREMENT

34 TAC §31.18, §31.19

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts two rules related to employment after retirement: amended §31.18, concerning changes to the bus driver exception and new §31.19, concerning the creation of an exception for professional nursing program faculty. Amended §31.18 and new §31.19 are adopted without changes to the text of the proposed rules as published in the November 4, 2005, issue of the *Texas Register* (30 TexReg 7196).

The Legislature recently added new language to the statute concerning the bus driver exception to restrictions on employment after retirement, §824.602 of the Government Code. The new language requires that bus driving must be the retiree's primary employment in order to qualify for the exception. Before the enactment of the statutory amendments, there was no minimum requirement set by law for the amount of bus driving required for this exception. By current Board rule, the bus driver exception was available to a normal age retiree who daily drove at least one bus route approved by the Texas Education Agency. The amended statute does not define "primary employment" but by implication requires that other employment must be of a lesser nature. The adopted amendments to §31.18 provide that employment as a bus driver is "primary" if the total amount of other employment is less than one-half time. Amended §31.18 also requires that the retiree must actually drive the bus. Language describing the type of bus routes as "TEA approved" is amended to reflect the current practice of TEA's issuing guidelines for bus routes rather than approving bus routes. Other changes reflect reformatting the rule into subsections. The change in the law applies to members who retire after September 1, 2005.

The Legislature also amended §824.602 of the Government Code to add a new exception for faculty members of a professional nursing program under the employment after retirement laws. The new language prohibits TRS from withholding a monthly benefit from a retiree employed as a faculty member in an undergraduate or graduate professional nursing program, provided the retiree has been separated from service with all TRS-covered employers for a period of 12 months. Under the amended statute, the exception became effective beginning September 1, 2005 and will terminate at the end of the spring semester 2015. Adopted new §31.19 clarifies who is a faculty member for purposes of this rule and that the 12-month separation period must be 12 consecutive months. The new section also establishes procedures for making the election and filing the appropriate form with TRS. The adopted rule is patterned after the rules regarding the acute shortage area and the principal or assistant principal exceptions.

TRS received no public comments regarding the proposed amendments to §31.18 or proposed new §31.19.

Statutory Authority for amended §31.18 and new §31.19: Government Code, §824.601, which authorizes the Board to adopt rules necessary for administering laws in Government Code, Chapter 824, Subchapter G, concerning loss of benefits on resumption of service, including §824.602; and Government Code, §825.102, which authorizes the Board to adopt rules for the administration of the funds of the retirement system. Cross-reference to Statute for amended §31.18 and new §31.19: Act of May 27, 2005, 79th Leg., R.S., S.B. 1691, §16, ch. 1359 (to be codified as amendments to Tex. Gov't Code Ann. §824.602), which, for purposes of employment after retirement, makes changes to the bus driver exception; Act of May 27, 2005, 79th Leg., R.S., S.B. 132, §8, ch. 674 (to be codified as amendments to Tex. Gov't Code Ann. §824.602), which, for purposes of employment after retirement, creates an exception for faculty of professional nursing programs; and Government Code, §824.602, which provides exceptions to the loss of annuity by any service or disability retiree who works for a TRS-covered employer.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ronnie G. Jung
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For further information, please call: (512) 542-6438

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PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 325. GENERAL STATE POLICY COMMITTEE PROVISIONS

34 TAC §325.7

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts an amendment to §325.7, concerning travel expenses, without changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8647).

The amendment corrects the punctuation at the end of subsection (b), before the numerical listing under that subsection, by changing the period to a colon.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the State Policy Committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the adopted rule is Government Code, §659.146, regarding eligibility criteria for charitable organizations to participate in the state employee charitable campaign.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
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For further information, please call: (512) 475-0387

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CHAPTER 326. CAMPAIGN MANAGEMENT

34 TAC §326.3

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts new §326.3, concerning additional requirements, without changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8648).

This new rule provides additional requirements with which local campaigns must comply, including the statutory requirement that each Local Employee Committee (LEC) appoint a local campaign manager and the SPC requirement that the LEC assign a representative to attend annual training provided by the State Campaign Manager.

Three letters were received supporting the proposed requirement for §326.3 that a local campaign representative attend a yearly training session provided by the State Campaign Manager. Independent Charities of America, on behalf of itself, America's Best Charities, Children's Charitable Alliance of Texas, and Local Independent Charities of Texas, emphasized that the effect of the rule will be to provide an increase in communication, clear and effective training for local campaign management. Earth Share of Texas emphasized the importance of consistent local campaign practices throughout the state, indicating that the rules help toward that effort. Neighbor to Nation commented that the rule would allow for consistent understanding of the laws and regulations, and opportunities for local campaign managers and representatives to share ideas for successful campaigns. The SPC agrees, and it is because of those reasons that the rule is adopted.

The new rule is adopted under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with (the SECC law) and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

Other statutes, articles, or sections affected by the adopted rule are: Texas Government Code, §659.143, regarding duties of each Local Employee Committee (LEC).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §§329.3, 329.5, 329.7

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §329.3, concerning 25% administrative cost cap, adopts new §329.7, concerning compliance certification, without changes to the proposed text, and adopts new §329.5, concerning re-certification requirements, with changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8648). The SPC withdraws §329.1, concerning audit and review requirements. Formal notice of withdrawal will appear in the Withdrawn Rules section of the *Texas Register*.

The amendment to §329.3 codifies into rule the legislative exception, available only to certain charitable organizations, to the 25% cost cap that applies to all organizations that apply to participate in the SECC for the first time in 2004 or later. New §329.5 codifies and standardizes the process by which federations and affiliated charitable organizations that have been approved in a previous year can re-apply to participate in campaign by submitting a shortened application packet. This allows for more efficient application preparation and review to take place at the federation level and at the SPC level, resulting in less burden on labor and material resources. New §329.7 mirrors the requirements of the federal charitable campaign and is intended to help prevent SECC funds being used for engaging in transactions with entities

that are subject to economic sanctions. Some Local Campaign Managers and Federations have raised concerns about potential liability in funding such groups. Similar language is used in the combined federal campaign.

The following entities furnished written comments on the proposals: Independent Charities of America, Earth Share of Texas, America's Charities, and Neighbor to Nation.

The four entities in their comments, have asked the SPC to reconsider the proposed rule amendments for §329.1, which would allow organizations with budgets of more than $100,000 to submit either a Form 990 or similar documentation that uses the formula for determining administrative costs as set out in SPC rule §329.3. The comments expressed concern that the administrative costs of organizations that submit documentation other than an IRS Form 990 would be difficult to determine in any meaningful way or in a manner that is consistent with the process for determining administrative costs of organizations that do submit IRS Form 990.

The SPC believes if organizations use the formula set out in §329.3, as the proposed rule requires, the administrative fees could be accurately determined and would be determined in a manner that is consistent with the formula used to arrive at administrative costs using the IRS Form 990 that other organizations are required to use. Nevertheless, the SPC will not adopt the proposed amendment to §329.1 at this time. The SPC has withdrawn the proposed amendment to §329.1 and will propose a different amendment to that rule in the Proposed Rule section of the *Texas Register*.

All four entities commented regarding proposed new §329.5. Entities asked the SPC to consider allowing re-certifying organizations to submit only the first six pages of the IRS Form 990 instead of the entire form (America's Charities); or to either submit only the first page or the first six pages of the IRS Form 990 (Earth Share of Texas). Independent Charities of Texas on behalf of itself and America's Best Charities, Children's Charitable Alliance of Texas, and Local Independent Charities of Texas, stated it does not support including the IRS Form 990 at all for re-certification, stating it is superfluous because the organizations are required to keep current application information on hand with the federation. Neighbor to Nation and Independent Charities of Texas on behalf of itself and America's Best Charities, Children's Charitable Alliance of Texas, and Local Independent Charities of Texas, suggested that, instead of requiring a complete Form 990, the SPC should conduct spot audits of a sampling of re-certifying organizations every year to determine whether those expenditures comply with the last 990 on file and that such expenses are within the statutory requirements. The comments expressed concern at the expenditure of resources needed to compile a document that may be lengthy for each re-certifying organization. Some of the comments indicated that many of the pages of the Form 990 would not provide meaningful information for purposes of re-certification. Some of the comments also stated that all re-certifying organizations are already required by other than SPC rules to maintain a copy of the IRS Form 990 with the federation to which the organization belongs, if any.

The SPC agrees in part and does not agree in part with the comments to §329.5. Form 990 is required to ensure organizations are spending funds in accordance with statutory requirements. However, only page one is required to calculate the percentage of revenue that is taken by administrative costs. Requiring the first six pages, up to and including the signature page, constitutes an effort to ensure the veracity of the information provided to the SPC; and it provides a measure of accountability in so far as the signature and attestation of the individual preparing the Form 990 will be included in the form submitted to the SPC.

Therefore, to clarify the proposed requirement for the Form 990 as published, §329.5(c)(3) will be amended prior to adoption to add the following language after "(3) Internal Revenue Service (IRS) Form 990,": "specifically, the first six pages of the Form 990, up to and including the signature page, which shall contain the signature and attestation of the individual preparing the form."

Earth Share of Texas submitted a request that the SPC reconsider proposed new §329.5(g) which allows the SPC to deny an organization's re-certification under §329.5(g) "for any of the reasons a full application can be denied." Earth Share's concern is that by retaining this authority the SPC would contradict the purpose of the re-certification program. The letter also states that the SPC should not have the authority to deny participation for re-certifying organizations without adopting more guidelines. The SPC does not agree. All re-certifying organizations are held to the same level of scrutiny that any renewing organization is held, barring additional concerns that may arise from time to time with various select organizations. The only difference is in the amount of paper work the organization is required to submit. The re-certification program was instituted by the SPC to permit the conservation of paper resources and lessen the administrative burden on organizations, federations, local campaign managers, local employee committees, the state campaign manager, and the State Policy Committee when considering returning organizations for participation. However, the SPC will not limit its ability to review any aspects of an organization that are relevant to that entity's eligibility to participate in the SECC campaign, and to deny participation, when appropriate, even if it is a returning organization.

Other changes to §329.5 as published are as follows: subsections (b)(2) and (c)(2) are changed to insert a hyphen between the words "3" and "year;" subsection (f) is changed to delete the hyphen between "third" and "year" and to insert a comma after "Every third year." Wherever the term "recertification" or "recertifications" appears in the proposed rule, a hyphen is being added after the first "e" and before the first "c."

The changes to §329.5 affect no new persons, entities, or subjects other than those given notice. Compliance with the adopted sections will be less burdensome than under the proposed sections.

These amendments and new rules are adopted under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the adopted rules is Government Code, §659.146, regarding eligibility criteria for charitable organizations to participate in the state employee charitable campaign.

§329.5. Re-certification Requirements.

(a) To be eligible to participate in the State Employee Charitable Campaign and apply via the re-certification process:

(1) the statewide federation/fund and affiliates must have not spent more than 25% of their annual revenue for administrative and fund raising expenses in the prior year's campaign; and

(2) statewide federation/fund and affiliates must have participated in the prior year's State Employee Charitable Campaign.

(b) To participate in the State Employee Charitable Campaign via the re-certification process the statewide federation/fund must submit the following:

(1) letter from the State Policy Committee stating eligibility to apply to the State Employee Charitable Campaign via the re-certification process;

(2) organization information page including 3-year history of administrative expense percentages;

(3) all documentation in compliance with §329.1 of this title (relating to Audit and Review Requirements); and

(4) current operating budget.

(c) To participate in the State Employee Charitable Campaign via the re-certification process the affiliate charitable organization must submit the following:

(1) letter from the State Policy Committee stating eligibility to apply to the State Employee Charitable Campaign via the re-certification process;

(2) affiliate information page including 3-year history of administrative expense percentages; and

(3) Internal Revenue Service (IRS) Form 990, specifically, the first six pages of the Form 990, up to and including the signature page, which shall contain the signature and attestation of the individual preparing the form. The form must be less than 18 months old.

(d) To participate in the State Employee Charitable Campaign via the re-certification process the affiliate charitable organization must submit a complete application to the statewide federation/fund.

(e) A complete application with all documentation shall be maintained by the statewide federation/fund for 3 years from the date of application. The SPC may conduct a random audit of any and all documentation prior to approval of the federation/fund or affiliate for any year's State Employee Charitable campaign.

(f) Every third year, the statewide federation/fund must submit a complete application for the federation/fund and affiliates.

(g) Each re-certification application is subject to review by the current State Policy Committee, is subject to the current rules, and can be denied for any of the reasons that a full application can be denied.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kevin Van Oort
Certifying Officer, State Policy Committee
State Employee Charitable Campaign
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For further information, please call: (512) 475-0387

CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §§330.3, 330.7, 330.9

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts §330.3, concerning 25% administrative cost cap, adopts new §330.9, concerning compliance certification without changes to the proposed text, and adopts new §330.7, concerning recertification requirements, with changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8650). The SPC withdraws §330.1, concerning audit and review requirements. Formal notice of the withdrawal will appear in the Withdrawn Rules section of the *Texas Register*.

The amendment to §330.3 codifies into rule the legislative exception, available only to certain charitable organizations, to the 25% cost cap that applies to all organizations that apply to participate in the SECC for the first time in 2004 or later. New §330.7 would codify and standardize the process by which federations and affiliated charitable organizations that have been approved in a previous year can re-apply to participate in campaign by submitting a shortened application packet. This allows for a more efficient application preparation and review to take place at the federation level and at the SPC level, resulting in less burden on labor and material resources. New §330.9 mirrors the requirements of the combined federal charitable campaign and is intended to help prevent SECC funds being used for engaging in transactions with entities that are subject to economic sanctions. Some Local Campaign Managers and Federations have raised concerns about potential liability in funding such groups. Similar language is used in the combined federal campaign.

No comments were received in response to any of the proposed rules. Although no comments were received in response to proposed rule amendments to §330.1, the rule provides a similar requirement for organizations participating in the local campaigns that §329.1 provides for the statewide campaign. The SPC seeks to adopt rules that allow for consistent campaign practices at the local level and the statewide level to the extent that is feasible.

Entities commenting to proposed amendments to rule §329.1, which are similar to the amendments of proposed §330.1, have asked the SPC to reconsider the proposed rule amendments that would allow organizations with budgets of more than $100,000 to submit either a Form 990 or similar documentation that uses the formula for determining administrative costs as set out in other SPC rules. The comments expressed concern that the administrative costs of organizations that submit documentation other than an IRS Form 990 would be difficult to determine in any meaningful way or in a manner that is consistent with the process

for determining administrative costs of organizations that do submit IRS Forms 990.

The SPC believes if organizations use the formula set out in §330.3 as the proposed rule requires, the administrative fees could be accurately determined and would be determined in a manner that is consistent with the formula used to arrive at administrative costs using the IRS Form 990 that other organizations are required to use. Nevertheless, the SPC will not adopt the proposed amendment to §330.1 at this time. The SPC has withdrawn the proposed amendment to §330.1 and will propose a different amendment to that rule in the Proposed Rule section of the *Texas Register*.

Likewise, although no comments were received regarding proposed rules §330.7, the SPC will adopt that new rule to conform the review of local campaign matters to the method and practices used by the SPC for the statewide campaign under new §329.5.

Regarding §330.7, relating to the requirement that all re-certifying organizations submit an IRS Form 990 with the re-certification documents, Form 990 is required to ensure organizations are spending funds in accordance with statutory requirements. However, only page one is required to calculate the percentage of revenue that is taken by administrative costs. Requiring the first six pages, up to and including the signature page, constitutes an effort to ensure the veracity of the information provided to the SPC; and it provides a measure of accountability in so far as the signature and attestation of the individual preparing the Form 990 will be included in the form submitted to the SPC.

Therefore, to clarify the proposed requirement for the Form 990 as published, §330.7(c)(3) will be amended prior to adoption to add the following language after "(3) Internal Revenue Service (IRS) Form 990,": "specifically, the first six pages of the Form 990, up to and including the signature page, which shall contain the signature and attestation of the individual preparing the form."

Regarding proposed §330.7(g), all re-certifying organizations are held to the same level of scrutiny that any renewing organization is held, barring additional concerns that may arise from time to time with various select organizations. The only difference is in the amount of paper work the organization is required to submit. The re-certification program was instituted by the SPC to permit the conservation of paper resources and lessen the administrative burden on organizations, federations, local campaign managers, local employee committees, the state campaign manager, and the State Policy Committee when considering returning organizations for participation. However, the SPC will not limit its ability to review any aspects of an organization that are relevant to that entity's eligibility to participate in the SECC campaign, and to deny participation, when appropriate, even if it is a returning organization.

Other changes to §330.7 as published are as follows: subsection (a) is changed to correct the spelling of the word "State", subsections (b)(2) and (c)(2) are changed to insert a hyphen between the words "3" and "year;" subsection (c) is amended to capitalize the first letter in "charitable;" subsection (f) is changed to insert a comma after "Every third year." Wherever the term "recertification" or "recertifications" appears in the proposed rule, a hyphen is being added in the adopted rule after the first "e" and before the first "c."

The changes described affect no new persons, entities, or subjects other than those given notice. Compliance with the adopted sections will be less burdensome than under the proposed sections.

These amendments and new rules are adopted under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the adopted rules is Government Code, §659.146, regarding eligibility criteria for charitable organizations to participate in the state employee charitable campaign.

§330.7. Re-certification Requirements.

(a) To be eligible to participate in the State Employee Charitable Campaign and apply via the recertification process:

(1) the local federation/fund and affiliates must have participated in the previous year's campaign; and

(2) the local federation/fund and affiliates must have not spent more than 25% of its annual revenue for administrative and fund raising expenses in the prior year's campaign;

(b) To participate in the State Employee Charitable Campaign via the re-certification process the local federation/fund must submit the following:

(1) letter from the State Policy Committee stating eligibility to apply to the state employee charitable campaign via the re-certification process;

(2) organization information page including 3-year history of administrative expense percentages;

(3) all documentation in compliance with §330.1 of this title (relating to Audit and Review Requirements); and

(4) current operating budget.

(c) To participate in the State Employee Charitable Campaign via the re-certification process, the affiliate charitable organization must submit the following:

(1) letter from the State Policy Committee stating eligibility to apply to the state employee charitable campaign via the re-certification process;

(2) affiliate information page including 3-year history of administrative expense percentages; and

(3) Internal Revenue Service (IRS) Form 990, specifically, the first six pages of the Form 990, up to and including the signature pages, which shall contain the signature and attestation of the individual preparing the form. The form must be less than 18 months old.

(d) To participate in the State Employee Charitable Campaign via the re-certification process the affiliate charitable organization must submit a full application to the local federation/fund.

(e) A complete application with all documentation shall be maintained by the local federation/fund for 3 years after the date of application. The LEC or the SPC may conduct a random audit of any and all documentation prior to approval of the federation/fund or affiliate for any year's state employee charitable campaign.

(f) Every third-year, the local federation/fund will be required to submit a complete application for the federation/fund and affiliates.

(g) A local unaffiliated charitable organization is not eligible to apply to the State Employee Charitable Campaign via the re-certification process at any time. A full application with all required documentation must be submitted each year.

(h) Each re-certification application is subject to review by the current State Policy Committee or Local Employee Committee, is subject to the current rules, and can be denied for any of the reasons that a full application can be denied.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kevin Van Oort
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State Employee Charitable Campaign
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For further information, please call: (512) 475-0387

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CHAPTER 333. CAMPAIGN MATERIALS

34 TAC §333.7

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §333.7, concerning campaign materials guidelines, without changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8652).

These amendments modify the punctuation contained in subsection (a) of the current rule so as to identify the SPC and the State Advisory Committee (SAC) consistently throughout the rules.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Government Code, §659.139, which provides that the State Employee Charitable Campaign (SECC) must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees.

The other statute, article, or section affected by the adoption is Government Code, §659.140, regarding the duties of the SPC, including the duty to approve campaign materials.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 334. GRIEVANCE PROCEDURES

34 TAC §334.1, 334.3

The State Policy Committee (SPC) of the Texas State Employee Charitable Campaign (SECC) adopts amendments to §334.1, concerning procedures for grievances involving local campaign issues and §334.3, concerning procedures for grievances involving statewide campaign issues, without changes to the proposed text as published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8653).

These amendments will allow for the rules to be read more easily by avoiding the use of redundant words.

No comments were received regarding adoption of the amendment.

The amendments are adopted under the authority of Texas Government Code, §659.139, which provides that the state employee charitable campaign must be managed fairly and equitably in accordance with the SECC law and the policies and procedures established by the state policy committee. The SPC interprets this statute to authorize the adoption of rules to the extent that the policies and procedures adopted are of general applicability and affect the rights of third parties, namely charitable organizations, local campaign managers, local employee committees, the state advisory committee, the state campaign manager, and state employees. The adopted rules also are adopted under the authority of Texas Government Code, §659.140(e)(6) which requires the SPC to perform other duties prescribed by comptroller rules. Texas Administrative Code, Title 34, Part 1, Chapter 5, §5.48(n)(2)(I) authorizes the SPC to establish policies and procedures about the hearing of any grievance concerning the operation and administration of the campaign.

Other statutes, articles, or sections affected by the adopted rules are: Texas Government Code, §659.140(e)(5), which requires the SPC to oversee the state employee charitable campaign to ensure that all campaign activities are conducted fairly and equitably to promote unified solicitation on behalf of all participants.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 845. TEXAS WORK AND FAMILY CLEARINGHOUSE

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §845.1, §845.2

The Texas Workforce Commission (Commission) adopts amendments to the following sections of Chapter 845 related to the Texas Work and Family Clearinghouse *without* changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8835):

Subchapter A, General Provisions, §845.1 and §845.2.

Texas Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission has reviewed Chapter 845 and determined that reasons for adopting the chapter exist; however, amendments to the rules are needed in order to update terminology and reflect recent changes in state law.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH PUBLIC COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The Commission adopts amendments to 40 TAC §845.1 and §845.2 relating to the Texas Work and Family Clearinghouse (Clearinghouse). The purpose of the adopted amendments is to reflect legislative changes resulting from House Bill 2962 (HB 2962), enacted by the 79th Legislature, Regular Session. HB 2962 became effective immediately upon signature of the Governor on May 30, 2005. Among other changes, HB 2962 repeals the following sections of Chapter 81 of the Texas Labor Code relating to the Clearinghouse:

Section 81.002 relating to the Work and Family Policies Advisory Committee; and

Section 81.004(b) requiring the Clearinghouse to conduct research on child care and other employment-related family issues.

The adopted amendments to 40 TAC §845.1 and §845.2 remove the following:

Section 845.1(b), which stated that one of the purposes of the Clearinghouse is to conduct research on child care and other employment-related family issues based on the recommendations of the Work and Family Policies Advisory Committee;

Section 845.2(1), which included the definition of the Work and Family Policies Advisory Committee; and

Section 845.2(2), which included the definition of Commission.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH PUBLIC COMMENTS AND RESPONSES

(Note: Minor, nonsubstantive, editorial changes are made throughout Subchapter A, General Provisions, of this chapter that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

§845.1. Goals and Purpose.

HB 2962 repealed Texas Labor Code §81.004(b) requiring the Clearinghouse to conduct research on child care and other employment-related family issues. Therefore, the Commission adopts amendments to §845.1 by removing subsection (b), which requires the Clearinghouse to conduct and compile research on child care and other employment-related family issues based on the recommendations of the Work and Family Policies Advisory Committee.

§845.2. Definitions.

HB 2962 repealed Texas Labor Code §81.002, thus abolishing the Work and Family Policies Advisory Committee. Therefore, the Commission adopts amendments to §845.2 by removing paragraph (1) that provides the definition of the Advisory Committee. Additionally, the Commission adopts amendments to §845.2 by removing paragraph (2), the definition of Commission. Section 800.2 of this title contains the definition of the term Commission; therefore, it is not necessary to redefine it in this chapter. Additionally, the Commission renumbers §845.2(3) - (6) as §845.2(1) - (4), respectively.

The Commission received no comments on the proposed rule language.

The amendments are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted amendments will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Labor Code, Chapter 81.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Workforce Commission
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 5. FINANCE

SUBCHAPTER D. PAYMENT OF FEES FOR DEPARTMENT GOODS AND SERVICES

43 TAC §5.44

The Texas Department of Transportation (department) adopts amendments to §5.44, concerning exceptions to the payment of fees for department goods and services. The amendments to §5.44 are adopted without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8836) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §201.208 authorizes the Texas Transportation Commission (commission) to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department or for the administration of any department program. Pursuant to that authority, the commission has adopted §§5.41 - 5.44 to include a minimum and maximum amount that could be charged using a credit card, as well as a requirement that a person paying a fee by credit card also pay a $1.00 convenience fee.

New §27.82, adopted as part of this rulemaking, authorizes the department to adopt policies relating to toll collection and enforcement and the operation of customer service centers that, among other provisions, will authorize all fees imposed under that section to be paid by credit card, debit card not requiring the entry of a personal identification number (PIN), money order, personal or cashier's check, or cash. New §27.82 authorizes the commission to establish toll rates for the use of a toll project, and authorizes the department to charge fees to customers for purposes of establishing and administering electronic toll collection customer accounts.

New §27.82 does not include a minimum or maximum charge amount or require the payment of a convenience fee for a credit card payment. The toll rates and customer account fees will be publicized to potential customers through various methods, and will be considered when a motorist is determining whether to use a toll project, and by the public when determining whether to establish a customer account. Charging an additional fee to customers that will increase the publicized fees for the use of a toll project, or requiring a minimum or maximum charge amount, may result in an adverse impact on toll related sales and revenues and the number of persons using the toll project, thereby resulting in a higher than anticipated level of congestion on non-toll facilities.

Section 5.44 is amended to specify that the requirements of Chapter 5, Subchapter D (§§5.41 - 5.44) do not apply to the payment of tolls and customer account fees under §27.82 of this title (relating to Toll Operations).

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.208, which authorizes the commission to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.208.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER A. GENERAL

43 TAC §25.1

The Texas Department of Transportation (department) adopts amendments to §25.1, Uniform Traffic Control Devices, concerning the Texas Manual on Uniform Traffic Control Devices (Texas MUTCD). The Texas MUTCD is amended periodically to maintain substantial compliance with the National Manual on Uniform Traffic Control Devices (National MUTCD), to allow use of a single manual for local, state, and Federal-aid highway projects. These amendments incorporate the latest federal requirements of the National MUTCD into the Texas MUTCD. The amendments to §25.1 are adopted with changes to the proposed text as published in the December 2, 2005, issue of the *Texas Register* (30 TexReg 8043). As a result of comments received, the Texas MUTCD is adopted with changes to the draft manual as adopted by reference (*see* December 2, 2005 issue of the *Texas Register* (30 TexReg 8043)).

The National MUTCD defines the standards used by road managers nationwide to install and maintain traffic control devices on all streets and highways open to public travel. The National MUTCD is published by the Federal Highway Administration (FHWA) under Title 23, Code of Federal Regulations, Part 655, Subpart F.

The FHWA has recently completed a major revision and reformat of the National MUTCD. All states are required to adopt the provisions of this new federal manual.

Section 25.1(a) adopts by reference the 2006 Texas MUTCD. In addition, the amendments add bicycle trails to the types of transportation facilities in which the Texas MUTCD applies. This section also clarifies that the Texas MUTCD only applies to streets, highways, and bicycle trails that are open to public travel. For clarification, the street address for the Office of the Secretary of State has also been added.

The amendment also provides that the Texas MUTCD will be available online through the department's website and will no longer be published. For those unable to access the department's website, copies are available on request. Subsections (d) and (e) are no longer necessary and are deleted from the adopted rule.

COMMENTS

The department received several comments on the proposed revisions to the Texas MUTCD that were proposed for adoption

by reference and filed with the Texas Register Division of the Secretary of State. The comments concern various sections of the manual.

Comment

One commenter noted that the manual referred to a sign appendix summarizing all signs discussed in the manual but the appendix was not attached to the manual. The commenter asked if the appendix will be included with the adopted version of the manual.

Response

The department agrees with the request and has added the sign appendix to the adopted rule. The appendix does not add any substantive material. It is a summary of what is contained in the adopted manual.

Comment

Regarding Chapter 4F "Traffic Control Signals for Emergency Vehicle Access", one commenter asked that warrants be included for the installation of traffic signals and flashing beacons at fire station access points since limited guidance was in the manual.

Response

The department agrees that limited guidance was contained in the manual for emergency vehicle traffic control signals. Warrants for emergency vehicle access signals have been added to Section 4F.01 of the manual and warrants for emergency vehicle access flashing beacons have been included in Section 4F.04.

Comment

One commenter suggested changes related to the application of school speed zones, specifically related to Figure 7B-3.

Response

Figure 7B-3 shows an example of a school speed zone application. Section 7B.11 provides wording allowing the application of school speed zones per the commenter's request. Therefore, no changes to the proposed Texas MUTCD were made.

Comment

One commenter submitted numerous items related to punctuation, grammar and formatting.

Response

The comments did not change the meaning or intent of the text in the manual and have not been individually listed here. The comments have been incorporated into the manual.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the Texas Transportation Commission to promulgate rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code §544.001.

§25.1. Uniform Traffic Control Devices.

(a) The 2006 Texas Manual on Uniform Traffic Control Devices, which is filed with this section and hereby incorporated by reference, was prepared as required by law to govern standards and specifications for all such traffic control devices to be erected and maintained upon all streets, highways, and bicycle trails that are open to public travel within this state, including those under local jurisdiction. Copies of the manual are available online through the Texas Department of Transportation web site, www.dot.state.tx.us, and are on file for public inspection with the Office of the Secretary of State, Texas Register Division, James Earl Rudder State Office Building, 1019 Brazos St., Room 245, Austin, Texas 78701.

(b) This manual will be periodically updated. In the intervals between updates, standards contained in "Official Rulings on Requests for Interpretations, Changes, and Experimentation" to the United States Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways will be inserted in this manual and may be used as interim standards.

(c) This manual is not intended to preclude the use of sound engineering judgment and experience in the application and installation of devices and particularly in those cases not specifically covered which must not conflict with the manual or other applicable state laws.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
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Texas Department of Transportation
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SUBCHAPTER B. PROCEDURES FOR ESTABLISHING SPEED ZONES

43 TAC §§25.21, 25.23, 25.25

The Texas Department of Transportation (department) adopts amendments to §25.21, §25.23, and §25.25 concerning procedures for establishing speed zones. The amendments to §25.21, §25.23, and §25.25 are adopted without changes to the proposed text as published in the December 2, 2005, issue of the *Texas Register* (30 TexReg 8044) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 2257, 79th Legislature, Regular Session, 2005, expands the number of counties that are eligible for a maximum 75 mile per hour daytime speed limit as established by the Texas Transportation Commission (commission). House Bill 2257 also authorizes the commission to establish a maximum speed limit of 80 miles per hour on Interstate Highway 10 and Interstate Highway 20 in certain counties.

Section 25.21, Introduction, implements the legislative changes by adding the counties that now qualify for the 75 mile per hour speed limit. The amendment also states the counties eligible for the 80 mile per hour speed limit as authorized by House Bill 2257. Amendments to this section also note that the maximum speed allowed on a portion of the Trans-Texas Corridor is 85 miles per hour as authorized under Transportation Code, §545.3531.

Various changes to §25.23, Speed Zone Studies, allow a four hour observation period for a speed study if performed with a

traffic counter that classifies vehicles by type. These changes reflect current agency practice and are non-substantive in nature.

Section 25.23(c)(5), clarifies that when a study indicates that the 85th percentile speed is at or below 50 miles per hour, the resulting school zone speed limit should not be set more than 15 miles per hour below the 85th percentile speed. The current language only states that this requirement applies to 85th percentile speeds of below 50 miles per hour. This is not a significant change and is included only as clarification.

Section 25.25, Application of Advisory Speeds, is amended to allow for the use of manual or electronic ball-bank indicators for use in determining the advisory speed limit for curves and turns. The Procedures for Establishing Speed Zones Manual (procedures manual) includes detailed information on the use of the ball-bank indicator, therefore, all references about how to use the ball-bank indicator have been deleted from the adopted rule. Figures 2, 4, and 5 in §25.25 are deleted. By deleting §25.25(b)(3)-(8), the department is able to update the procedures manual to accommodate the use of new technology.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §545.353, and §545.3531.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. CONGESTION MITIGATION FACILITIES

43 TAC §25.41

The Texas Department of Transportation (department) adopts amendments to §25.41, Definitions, concerning congestion mitigation facilities. The amendments to §25.41 are adopted without changes to the proposed text as published in the December 2, 2005, issue of the *Texas Register* (30 TexReg 8047) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 1986, 79th Legislature, Regular Session, 2005, adds a coordinated county transportation authority as created under Transportation Code, Chapter 460, to the list of entities that the department may enter into an agreement with for the design, construction, operation, or maintenance of a high occupancy vehicle lane.

The amendment to §25.41(8), HOV Authority, adds a coordinated county transportation authority to the list of transit authorities that qualify as an HOV Authority. This will allow the department to enter into an agreement relating to HOV lanes with such an authority as required under the terms of the legislation.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §224.153(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 27. TOLL PROJECTS
SUBCHAPTER G. OPERATION OF DEPARTMENT TOLL PROJECTS

43 TAC §§27.80, 27.82, 27.83

The Texas Department of Transportation (department) adopts amendments to §27.80 and new §27.82 and §27.83, concerning the operation of department turnpike projects. The amendments to §27.80 and new §27.82 and §27.83 are adopted without changes to the proposed text as published in the December 30, 2005, issue of the *Texas Register* (30 TexReg 8845) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTIONS

Transportation Code, Chapter 228, Subchapter B, authorizes the Texas Transportation Commission (commission) and the department to impose tolls for the use of a department toll project, and to perform various functions necessary for the operation of a department toll project, including the imposition of fees relating to toll collection and enforcement and the operation of customer service centers.

Transportation Code, §228.052, authorizes the department to enter into an agreement with one or more persons to provide, on terms approved by the department, personnel, equipment, sys-

tems, facilities, and services necessary to operate a toll project or system. Transportation Code, §228.057, authorizes the department to charge reasonable fees for administering electronic toll collection customer accounts.

Section 27.80 is amended to define terms used in new §27.82 and §27.83, including comprehensive development agreement, operational concession, and tag.

In order to implement the authority granted in Transportation Code, Chapter 228, Subchapter B, new §27.82, authorizes the department to adopt policies relating to toll collection and enforcement and the operation of customer service centers. New §27.82 prescribes criteria to be considered by the department in adopting those policies that are intended to facilitate mobility on department facilities, the auditing of customer service center operations, and the marketing of toll projects, as well as providing a high level of customer service. Transportation Code, Chapter 228, Subchapter B, prescribes the process that may be used by the department to enforce toll collections, including issuing notices of nonpayment and assessing administrative fees, and contracting with a private person or entity to collect the unpaid toll and administrative fee before referring the matter to a court with jurisdiction over the offense. Accordingly, new §27.82 provides that toll collection and enforcement policies adopted by the department are not subject to the requirements of §5.10 (relating to Collection of Debts).

New §27.82 also prescribes the amount of fees charged to customers for purposes of establishing and administering electronic toll collection customer accounts, and for enforcing the collection of unpaid tolls. Those amounts have been set to allow the department to recover its costs. New §27.82 authorizes the department to temporarily waive tag fees for the purposes of introducing motorists to toll projects and attracting new customers. New §27.82 also prescribes criteria for the setting of toll rates by the commission and conditions for authorizing a private entity to set toll rates and establish administrative fees under an agreement with the department to operate a toll project. New §27.82 authorizes the department to suspend the imposition of an administrative fee if a violator agrees to open a funded account and to maintain that account in good standing, and to waive the fee if the account is maintained in good standing for the period of time determined by the department. In order to ensure sufficient department oversight over the setting of toll rates and fees, the private entity is required to submit to the department for approval its methodology for setting and increasing toll rates and establishing administrative fees.

In order to implement the authority granted in Transportation Code, §228.052, new §27.83 prescribes requirements for soliciting proposals to operate a department toll project or system. Transportation Code, §227.083, differentiates between operating agreements under which the private entity operates a toll project for a fee, and an operational concession under which the private entity purchases the right to conduct a business involving a toll project for a specified number of years in return for a fee paid to the department and the assumption of operation and maintenance responsibilities. An operational concession must be procured using a two step procurement process in which proposals are first evaluated to determine a short list of the most qualified and experienced proposers, with detailed proposals then requested from the shortlisted proposers. Other types of operating agreements may be procured using a one step procurement process that requests detailed proposals.

New §27.83 prescribes requirements for a procurement, including the contents of a request for qualifications or request for proposals, evaluation criteria to be used during the evaluation of a request for qualifications or request for proposals, and conditions to negotiations with the apparent best value proposer and award of a contract.

COMMENTS

No comments on the proposed amendments and new sections were received.

STATUTORY AUTHORITY

The amendments and new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 228, Subchapter B.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 29. MAINTENANCE
SUBCHAPTER C. OPERATION OF STATE-OWNED FERRIES

The Texas Department of Transportation (department) adopts the repeal of §29.48 and simultaneously adopts new §29.48 concerning boarding priorities of state owned ferries. New §29.48 is adopted with changes to the proposed text as published in the September 9, 2005, issue of the *Texas Register* (30 TexReg 5773). The repeal of §29.48 is adopted without changes to the proposed text as published in the September 9, 2005, issue of the *Texas Register* (30 TexReg 5773) and will not be republished.

EXPLANATION OF ADOPTED REPEAL AND NEW SECTION

Transportation Code, §342.004, allows the department to adopt rules to establish a system under which any owner of a motor vehicle may apply to the department for issuance of a sticker for a vehicle that entitles the vehicle to have priority in boarding the Galveston-Port Bolivar ferry or the Port Aransas ferry operated by the department. Pursuant to this authority, the Texas Transportation Commission (commission) has previously adopted §29.48 to allow certain vehicles priority in boarding a ferry.

The department adopts the repeal of §29.48 and simultaneously adopts new §29.48 in a revised form. New §29.48(a)(1) outlines special emergency or humanitarian boarding situations, such as ambulances and other vehicles transporting sick or injured persons, fire department vehicles, medical doctors en route to

an emergency, law enforcement officers engaged in the performance of an official duty, U.S. Coast Guard vehicles responding to marine emergencies, school buses, funeral processions, and public transportation vehicles carrying six or more persons. Vehicles with special boarding situations will receive priority over all other vehicles boarding the ferry.

New §29.48(a)(2) outlines the various fees for an annual permit for the Galveston/Bolivar and Port Aransas ferries. The department will begin issuing permits once 500 applications have been received. The fees vary based on the size of the vehicle and the number of permits issued per applicant. An annual permit will be effective for 12 months from the month it is issued. Upon completion of a permit application and payment of required fees, a boarding priority permit and windshield sticker will be issued.

The reference in §29.48(a)(2)(B) to a one-axle vehicle has been deleted because there are no one-axle vehicles that will utilize priority boarding.

Section 29.48(a)(3) provides for the ferry captain or ferry operations manager, at their own discretion, to allow priority boarding for humanitarian reasons. Section 29.48(b) provides that all other vehicles shall board in order of arrival after priority boarding is completed.

COMMENTS

Public hearings were held on September 19, 2005 in Port Aransas, Texas and on November 29, 2005 in Crystal Beach, Texas, and various oral and written comments were received, including sixty-two comments indicating general support of the proposed rules and nineteen comments indicating general opposition to the proposed rules. Summaries of the comments and commission responses are as follows.

Galveston/Bolivar Ferry

COMMENT

Five commenters stated there are special needs for the elderly and people with medical disabilities or handicapped and for doctor visits.

RESPONSE

Section 29.48(a)(3) authorizes the ferry captain or ferry operations manager to allow priority boarding for humanitarian purposes not covered in §29.48(a)(1). Regular doctor visits are not included for priority boarding because regular doctor visits can be scheduled for off-peak periods. Department records show that 86% of the time there is no waiting period before boarding the Galveston/Bolivar Ferry.

COMMENT

Two commenters suggested taking into consideration the need for short term passes or weekend only passes, charging a lower fee at first and increasing it later to cover costs, or allowing monthly payments by credit card, debit card, or any method to make it easier to pay.

RESPONSE

Transportation Code, §342.004, requires the department to collect priority boarding fees annually and issue stickers. Even if the fee could be broken down into monthly payments, it would not be practical to issue the corresponding stickers on a monthly basis. Weekend only passes would overload the priority boarding system because of travel peaks during these periods and holidays.

COMMENT

One commenter suggested a reversible line in Galveston.

RESPONSE

The department disagrees with this suggestion. Reversible lines have been considered by the Houston District and concern about traffic safety and handling local cross traffic make this option undesirable.

COMMENT

A comment was received suggesting public transportation or shuttle buses be provided.

RESPONSE

The department supports existing public transportation in the city of Galveston and on the Bolivar Peninsula with public funds. To encourage public transportation, public transportation vehicles that are carrying six or more passengers are added to the special situation boarding outlined in revised subsection (a)(1)(I). In addition, the department will cooperate by providing locations for buses or shuttles to stop and pick up passengers. Commercial shuttles may purchase a priority boarding pass.

COMMENT

One commenter requested that the fee structure be made simpler.

RESPONSE

The department chose to impose extra charges for vehicles that take up extra space since only 50% of the ferry's capacity can be devoted to priority boarding at any time.

COMMENT

Nine commenters requested that only residents and home owners be eligible for priority boarding.

RESPONSE

The department has no statutory authority to provide special treatment to any group of citizens.

COMMENT

One commenter stated that the department received an appropriation for the capital improvements, so the fee should be based solely on the cost to administer the program rather than the cost of capital improvements.

RESPONSE

Only the ramp and additional ferry are funded by the appropriation. The priority boarding fee is designed to cover other roadway improvements specific to and necessitated by priority boarding as well as the operational costs of the priority boarding system.

COMMENT

Nineteen commenters said the $400 annual fee was too high. One commenter said the fee should be lowered and amortized over a longer period of time. One person said the fee should be $100.

RESPONSE

Based on the comments received, the department determined that it would be unlikely to sell a sufficient number of permits at $400 to justify the program. The department is lowering the fee for two-axle vehicles to $250 for the first vehicle, and $150 for other two-axle vehicles at the same address.

COMMENT

One commenter stated that multi-axle vehicles should pay more.

RESPONSE

In order to increase the likelihood that a sufficient number of annual permits would be sold, the department has lowered the proposed fee from $600 to $500 for buses, motor homes, or single unit trucks with up to three axles. In order to compensate for the lower fees charged for smaller vehicles, and due to the anticipated demand for annual permits for large vehicles, the department has raised the proposed fee from $800 to $1,000 for multi-unit trucks or other vehicles with more than three axles.

COMMENT

One commenter stated that priority passes should be available to all taxpayers.

RESPONSE

Under the proposed rule, priority passes will be available to all taxpayers.

COMMENT

One commenter requested that hanging tags be used instead of stickers.

RESPONSE

The statute specifically requires the department to issue stickers rather than hanging tags.

COMMENT

Two commenters recognized that if too many vehicles obtain priority boarding passes that the priority system would not work.

RESPONSE

The department agrees with this concern.

COMMENT

Several people commented that the department needs to improve the landing and add more ferries to improve operations and service.

RESPONSE

These comments do not pertain to the proposed rules.

COMMENT

One commenter requested a breakdown of the financial analysis that justified the proposed $400 fee.

RESPONSE

Construction cost of adding a paved lane: $3,840,000 paid off in ten years at $384,000 per year. Printing stickers: $2000 per year. Contract security: $200,000 per year. Maintenance of traffic lane: $2,000 per year. Temporary personnel to process applications: $15,000 per year. Forms and computer time: $2000 per year. Additional personnel at ferries: $170,842 per year. Total cost: $775,842 per year, divided by 2000 stickers sold: $387.92. The cost was rounded to $400. These costs are for the Galveston/Bolivar ferry system. Similar costs were estimated for the Port Aransas ferries.

COMMENT

One commenter submitted a packet of comments initially submitted in February of 2005. These comments address issues such as wait time, trucks, dredging, maintenance of existing ferries, park and ride, lane problems, and temporary fixes.

RESPONSE

These comments do not pertain to the proposed rules.

Port Aransas Ferry

COMMENT

One commenter said that the 50% capacity given to priority boarders and 50% to others would result in no advantage to priority boarders.

RESPONSE

Transportation Code, §342.004, requires the department to limit priority boarding to 50% of the ferry's vehicle capacity.

COMMENT

Eight commenters suggested issuing transferable hanging tags rather than stickers.

RESPONSE

Transportation Code, §342.004, does not give the department the option of selling hanging tags rather than stickers.

COMMENT

Five people said the fee is too high.

RESPONSE

Based on comments received, the department determined that it would be unlikely to sell a sufficient number of permits at $400 to justify the program. The department is lowering the fee for two-axle vehicles to $250 for the first vehicle, and $150 for other two-axle vehicles at the same address.

COMMENT

Nine commenters were opposed to priority boarding stickers because of safety concerns about what other drivers will do. There were also other statements about safety concerns for priority boarders and other passengers in general.

RESPONSE

The department will provide extra security during peak periods of operations to protect the users of the ferry.

COMMENT

A number of people were against transferable hanger type passes because this would encourage theft and would reduce revenues.

RESPONSE

The statute and the rule only allow a sticker placed on the windshield.

COMMENT

One person is for a pure toll ferry and would not support priority passes.

RESPONSE

This rule implements Transportation Code, §342.004, which provides for priority boarding rather than tolls. The department is not authorized to charge tolls.

COMMENT

Three commenters suggested that priority boarding be offered to residents and home owners only.

RESPONSE

The department has no authority to provide special treatment to any group of citizens.

COMMENT

Two people suggested that businesses be charged a discount rate.

RESPONSE

The department lacks statutory authority to do this.

43 TAC §29.48

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and, more specifically, Transportation Code, §342.004, which authorizes the commission to adopt rules to establish a priority boarding system.

CROSS REFERENCE TO STATUTE

Transportation Code, §342.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200601014
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Effective date: March 16, 2006
Proposal publication date: September 9, 2005
For further information, please call: (512) 463-8683

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43 TAC §29.48

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and, more specifically, Transportation Code, §342.004, which authorizes the commission to adopt rules to establish a priority boarding system.

CROSS REFERENCE TO STATUTE

Transportation Code, §342.004.

§29.48. Boarding Priorities.

(a) Priority boarding for vehicles is divided into three categories as follows: priority boarding for special situations, priority boarding by annual permit, and priority boarding for humanitarian purposes.

(1) Special situation boarding is for the following vehicles, in no specific order of priority. These vehicles shall have priority boarding over all other vehicles in boarding a ferry:

(A) ambulances when transporting sick or injured persons, or when responding to or returning from medical emergencies;

(B) other vehicles transporting sick or injured persons;

(C) fire department vehicles when responding to or returning from fire or medical emergencies;

(D) medical doctors who are en route for the emergency care of the sick or injured;

(E) law enforcement officers when engaged in the performance of an official duty;

(F) U.S. Coast Guard vehicles when responding to or returning from marine emergencies;

(G) school buses when going to or returning from school functions;

(H) funeral processions; and

(I) public transportation vehicles carrying six or more passengers.

(2) Priority boarding for vehicles by annual permit shall meet the following conditions.

(A) No more than 50% of the ferry capacity will be allocated to priority boarding by annual permit during high demand periods.

(B) The fee for an annual permit for the Galveston/Bolivar or Port Aransas ferry is:

(i) $250 for a two-axle vehicle, including a motorcycle, car, pickup truck, or van;

(ii) $500 for a bus, motor home, or a single unit truck with up to three axles; and

(iii) $1,000 for a multi-unit truck or other vehicle with more than three axles.

(C) If the applicant purchases more than one annual permit, the subsequent permits for each additional two-axle vehicle registered to the same address as another vehicle with an unexpired annual permit are $150 each.

(D) An annual permit expires 12 months after issuance.

(E) An application for an annual permit shall be submitted by the vehicle owner on a form prescribed by the department, which shall at a minimum include the vehicle license plate number, state of registration, name of applicant, and mailing address. The application will state acceptable methods of payment.

(F) The department will not issue priority boarding stickers for a ferry location until it has received approximately 500 applications for that location.

(G) A priority boarding sticker will be issued to each applicant upon payment of the permit fee.

(H) The sticker issued for the permit shall be placed near the upper left corner of the front windshield.

(3) The ferry captain or ferry operations manager may, at his or her sole discretion, allow a vehicle priority over all other vehicles for humanitarian purposes. Scheduled routine doctor's office visits are not considered to be sufficient reason for granting priority boarding for humanitarian purposes.

(b) Vehicles that do not qualify for priority boarding under subsection (a) of this section shall be boarded in order of arrival after priority boarding is completed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 24, 2006.

TRD-200601015
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Effective date: March 16, 2006
Proposal publication date: September 9, 2005
For further information, please call: (512) 463-8683

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action on Rules

The Commissioner of Insurance will consider amendments proposed by the staff of the Data Services Division of the Property and Casualty Insurance program at the Texas Department of Insurance (Department) to the Texas Workers' Compensation Statistical Plan (the Plan). The 79th Texas Legislature enacted House Bill 7 which, in pertinent part, authorized the establishment of workers' compensation health care networks for the provision of workers' compensation medical benefits and provided the statutory framework for the establishment of standards for the certification, administration, evaluation, and enforcement of the delivery of health care services to injured employees by workers' compensation health care networks. The purpose of these proposed amendments to the Plan is to provide a means for insurers to report the premium credit that is addressed by the proposed amendments to Rule VI of the Texas Basic Manual of Rules, Classifications and Experience Rating Plan for Workers' Compensation and Employers' Liability Insurance by adding a new Section K to be entitled "Certified Workers' Compensation Health Care Networks." Those proposed amendments were published for comment in the *Texas Register* on February 17, 2006.

Staff's petition (Ref. No. W-0206-03-I) was filed on February 27, 2006.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period as specified herein.

The proposed amendments to the Plan are filed pursuant to Texas Insurance Code, Articles 5.58 and 5.96. Article 5.58(a) requires the Commissioner to develop reasonable statistical plans. Article 5.96 authorizes the Commissioner to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans, and policy and endorsement forms for workers' compensation insurance.

The staff has proposed amendments to the Plan as follows:

1. Amend Part III of the Plan (relating to Exposure and Premium) to add Item 17 to the reporting instructions to explain how the certified workers' compensation health care network premium credit is to be reported using Statistical Code 9874.

2. Amend Part X of the Plan (relating to Statistical Codes) to include Code 9874 Certified Workers' Compensation Health Care Network Premium Credit in the listing of statistical codes for Premium Not Subject to Experience Rating- Reported on Lines D, E, F, or G.

The staff requests that the proposed amendments to the Texas Workers' Compensation Statistical Plan described herein be adopted 15 days after notice of adoption is published in the *Texas Register*.

The Commissioner has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.58 and 5.96.

A copy of the full text of the proposed amendments is available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104. For further information or to request copies of the proposed amendments, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Ref. No. 0206-03-I).

Written comments to these proposed amendments may be submitted no later than 5:00 p.m. on April 10, 2006 to Gene C. Jarmon, General Counsel and Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comments must be submitted to Clare Pramuk, Data Services Director, Texas Department of Insurance, P. O. Box 149104, MC 105-5D, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200601158
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 28, 2006

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission (Commission) will review and consider for readoption, revision, or repeal Chapter 91, §§91.701 (Lending Powers), 91.702 (Records for Lending Transactions), 91.703 (Interest), 91.704 (Real Estate Lending), 91.705 (Home Improvement Loans), 91.706 (Home Equity Loans), 91.707 (Reverse Mortgages), 91.708 (Real Estate Appraisals), 91.709 (Member Business Loans), 91.710 (Overdraft Protection), 91.711 (Loan Participations), 91.712 (Plastic Cards), 91.713 (Indirect Financing of Motor Vehicles or Other Chattels), 91.714 (Leasing), 91.715 (Exceptions to the General Lending Policies), 91.716 (Prohibited Fees), 91.717 (More Stringent Restrictions), 91.718 (Charging Off or Setting Up Reserves), and 91.719 (Loans to Officials and Senior Management Employees) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Commission's Rule Review as required by Section 2001.039, Government Code.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting these rules continue to exist. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Credit Union Department.

Comments or questions regarding these rules may be submitted in writing to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to Kerri.Galvin@tcud.state.tx.us. The deadline for comments is May 1, 2006.

The Commission also invites your comments on how to make these rules easier to understand. For example:

* Do the rules organize the material to suit your needs? If not, how could the material be better organized?

* Do the rules clearly state the requirements? If not, how could the rule be more clearly stated?

* Do the rules contain technical language or jargon that isn't clear? If so, what language requires clarification?

* Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? If so, what changes to the format would make the rule easier to understand?

* Would more (but shorter) sections be better in any of the rules? If so, what sections should be changed?

Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule Section of the *Texas Register*. The proposed rules will be open for public comment prior to final adoption by the Commission.

TRD-200600957
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 23, 2006

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Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 74, Curriculum Requirements, pursuant to the Texas Government Code, §2001.039. The rules being reviewed in 19 TAC Chapter 74 are organized under the following subchapters: Subchapter A, Required Curriculum; Subchapter B, Graduation Requirements; Subchapter C, Other Provisions; Subchapter D, Graduation Requirements, Beginning with School Year 2001-2002; Subchapter E, Graduation Requirements, Beginning with School Year 2004-2005; and Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reason for adopting 19 TAC Chapter 74 continues to exist.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200600981
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 24, 2006

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The State Board of Education (SBOE) and the Texas Education Agency (TEA) propose the review of 19 TAC Chapter 89, Adaptations for Special Populations, pursuant to the Texas Government Code, §2001.039. The rules being reviewed in 19 TAC Chapter 89 are organized under the following subchapters: Subchapter A, Gifted/Talented Education; Subchapter B, Adult Basic and Secondary Education; Subchapter C, General Educational Development; Subchapter D, Special Education

Services and Settings; Subchapter AA, Commissioner's Rules Concerning Special Education Services; Subchapter BB, Commissioner's Rules Concerning State Plan for Educating Limited English Proficient Students; Subchapter CC, Commissioner's Rules Concerning Adult and Community Education; Subchapter DD, Commissioner's Rules Concerning High School Equivalency Programs; and Subchapter EE, Commissioner's Rules Concerning the Communities In Schools Program.

As required by the Texas Government Code, §2001.039, the SBOE and the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 89 continue to exist.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-200600982
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 24, 2006

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Adopted Rule Reviews

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) readopts Texas Administrative Code, Chapter 25, Substantive Rules Applicable to Electric Service Providers, pursuant to the Texas Government Code, Administrative Procedure Act (APA), §2001.039, Agency Review of Existing Rules. The notice of intention to review Chapter 25 was published in the *Texas Register* on September 23, 2005 (30 TexReg 6089). Project Number 31538 was assigned to this review proceeding.

APA §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to the Texas Government Code, Chapter 2001. Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rules continues to exist. The commission requested specific comments on whether the reason for adopting the substantive rules in Chapter 25 continues to exist.

The commission finds that the reason for adopting Chapter 25 continues to exist. However, the commission also finds that certain sections require amendments due to 2005 legislative changes or milestones that have passed. Separate rulemaking proceedings will be initiated to amend or repeal these sections as discussed further in this preamble.

The commission received comments on the notice of intention to review from AEP Texas Central Company, AEP Texas North Company and Southwestern Electric Power Company (collectively "AEP"), El Paso Electric Company (EPE), TXU Generation Company LP and TXU Portfolio Management Company LP (collectively "TXU Wholesale Markets"), and Xcel Energy, Inc. on behalf of Southwestern Public Service Co., (Xcel). Comments were also received by the REP Coalition, comprised of: CPL Retail Energy, Direct Energy, Entergy Solutions Ltd., First Choice Power, Gexa Energy, Green Mountain Energy Company, Reliant Energy, Stream Energy, TXU Energy Retail Company LP, WTU Retail Energy, the Alliance for Retail Marketers (comprising APS Energy Services, Constellation New Energy, Inc., Direct Energy, Entergy Solutions Limited, Green Mountain Energy Company, Hino Electric, Strategic Energy, Stream Energy, and Utility Choice Electric), and the Texas Energy Association for Marketers (comprising Accent Energy, Cirro Energy, Entergy Solutions Ltd, Star Tex Power, Stream Energy, Tara Energy and Utility Choice Electric).

Reply comments were received by AEP, CenterPoint Energy Houston Electric, LLC (CenterPoint), Texas Electric Cooperatives, Inc. (TEC), Texas-New Mexico Power (TNMP), and Tex-La Electric Cooperative of Texas (Tex-La), comprising Cherokee County Electric Cooperative, Association.; Deep East Texas Electric Cooperative, Inc.; Houston County Electric Cooperative, Inc.; Jasper-Newton Electric Cooperative; Rusk County Electric, Inc.; Sam Houston Electric Cooperative, Inc.; and Wood County Electric Cooperative, Inc.

General comments related to Chapter 25

Commenters stated that the majority of the rules in Chapter 25 should be readopted or readopted with amendments; however, there are certain sections that commenters believe should be repealed as indicated in subsequent discussions.

Tex-La commented that it supports the efforts of the commission and other parties to review the Chapter 25 Substantive Rules and believes that the current rules do support today's market. However, Tex-La noted, there are a few rules that are clearly obsolete or are no longer supported by Statute, or the underlying conditions for the rule no longer apply. Tex-La stated such rules should be repealed or revised to meet the changes in the Texas market structure.

TNMP commented that while the current rules do support today's market, there are specific rules that need to be amended or possibly deleted to provide clarity to market participants. TNMP added that while it has not recommended specific amendments to certain rule language, TNMP has reviewed comments filed by AEP, the REP Coalition, and others, and TNMP agrees with these parties that a further, in-depth review of the Chapter 25 rules will be beneficial and appreciates the opportunity to be involved in the review process.

The commission agrees that some general clean-up of the rules is needed to remove obsolete sections and to ensure that rules comport with recent Legislative amendments. These actions will be taken in separate proceedings relating to specific substantive rules in Chapter 25. New rulemaking projects will be initiated to make the necessary changes to individual rules, or group of rules, for which there are no current or planned proceedings. The comments made on rules which are the subject of current or planned proceedings will be considered in those proceedings.

Subchapter A. General Provisions

§25.2. Cross-Reference Transition Provision.

The REP Coalition commented that §25.2 is no longer necessary, while the TXU Wholesale Markets commented that §25.2 should be readopted.

Commission response

The commission finds that §25.2 continues to be necessary and readopts the section.

§25.3. Severability Clause.

TXU Wholesale Markets stated that §25.3 should be readopted.

Commission response

The commission readopts this section.

§25.4. Statement of Nondiscrimination.

TXU Wholesale Markets stated that §25.4 should be readopted.

Commission response

The commission readopts this section.

§25.5. Definitions.

TXU Wholesale Markets commented that this section should be readopted and suggested that the commission consider adding the acronym (QSE) to the definition of (95) Qualified Scheduling Entity.

Commission response

The commission will conduct an internal review to determine the necessity of a definition of a QSE and will initiate a separate rulemaking project as deemed necessary. The commission readopts this section.

§25.6. Cost of Copies of Public Information.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

The commission readopts this section.

§25.7. Relief for Victims of Hurricanes Katrina and Rita.

AEP and the TXU Wholesale Markets commented that this section expires under its own terms and should be allowed to expire on December 2, 2005.

Commission response

The expiration date in this section has been extended and will expire on its own terms on January 29, 2006.

Subchapter B. Customer Service and Protection

§25.27. Retail Electric Service Switchovers.

The REP Coalition commented that this section needs an "Applicability" section lead-in to ensure that it is understood that electric switchovers are available in transmission and distribution utility (TDU) service territories (*i.e.*, wires company switchovers). The REP Coalition noted that the applicability section of subchapter B states: "Unless the context clearly indicates otherwise, in this subchapter the term "electric utility" applies to all electric utilities that provide *retail* electric utility service in Texas" (emphasis added). Therefore, since §25.27 is contained within Subchapter B, the REP Coalition explained, this section should be revised to explicitly indicate that switchovers are also applicable to transmission and distribution utilities.

Commission response

The commission will conduct an internal review to determine the necessity of a definition of a QSE and will initiate a separate rulemaking project as deemed necessary. The commission readopts this section.

§25.30. Complaints.

The REP Coalition commented that this section also needs an "Applicability" section lead in to ensure that it is understood how complaints for TDUs are handled. Since §25.21(a) Application states that "Unless the context clearly indicates otherwise, in this subchapter the term "electric utility" applies to all electric utilities that provide *retail* electric utility service in Texas" (emphasis added), an Applicability sentence is needed to explicitly include TDUs in §25.30.

Commission response

The commission readopts this section.

§25.41. Price to Beat.

EPE commented that §25.41(f)(3)(A) and (B) should be amended because the dates in these subparagraphs have expired.

Commission response

The *Price to Beat* rule, §25.41, is currently being reviewed under Project Number 31416. The commission will consider the revision of these dates within the context of this review.

Subchapter C. Quality of Service

§25.52. Reliability and Continuity of Service.

EPE and the REP Coalition commented that §25.52(f)(1)(A) and (B) should be amended because the dates in these subparagraphs have expired.

Commission response

The commission agrees that the dates in this section have expired, but notes that the prevalence of the dates throughout §25.52(1)(A) and (B) would necessitate amending the entire subsection which could result in substantive changes to the System-wide standards subsection. The commission will conduct an internal review to determine the merits of amending the section and will initiate a separate rulemaking proceeding to address the proposed amendments as deemed necessary. The commission readopts this section.

§25.53. Emergency Operations Plan.

AEP commented that this section should be amended to specify the applicable entities in both the new market and among entities outside of ERCOT.

EPE commented that §25.53(a) should be amended because the dates in this subsection have expired.

Additionally, the REP Coalition commented that an Applicability section is needed at the beginning of this section to indicate that this subchapter expressly applies to TDUs as well as other electric utilities. A specific statement of application can be found is §25.52(a); however, that statement either needs to be repeated throughout all sections in Subchapter C or needs to be moved to become a lead-in to Subchapter C.

Commission response.

The commission plans to review emergency management and homeland security issues in a separate proceeding and intends to consider the proposed revision to §25.53 at that time.

The commission readopts this section.

Subchapter D. Records, Reports, and Other Required Information

§25.71. General Procedures, Requirements and Penalties and §25.72. Uniform System of Accounts.

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts these sections.

§25.73. Financial and Operating Reports.

TXU Wholesale Markets commented that this rule should be readopted, but added that the commission should consider the implications of the repeal of the Public Utility Holding Company Act on the obligation that §25.73 imposes on electric utility holding companies.

Commission response

After consideration of the affect of the repeal of the Public Utility Holding Company Act on the electric utility holding companies, the commission readopts this section.

§25.74. Reports on Sale of Property and Mergers and §25.75. Reports on Sale of 50% or more of Stock.

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts these sections.

§25.77. Payments, Compensation, and Other Expenditures and §25.78 State Agency Utility Account Information.

AEP commented that these sections should be repealed because the reports required by these sections are obsolete, inefficient and unnecessary.

Commission response

The commission finds the reports required by §25.77 and §25.78 useful and readopts these sections.

§25.87. Distribution Unbundling Reports.

AEP, EPE, and the REP Coalition all commented that this section should be repealed because the meter report required by this section is obsolete and unnecessary.

Commission response

The commission finds the Distribution Unbundling Reports useful and readopts §25.87.

§25.88. Retail Market Performance Measure Reporting.

The REP Coalition commented that at the conclusion of the Project Number 29637, *Rulemaking to Amend the Tariff for Retail Delivery Service*, this rule should be revised to include TDU field operational performance to ensure that timelines as defined in the Tariff are adhered to, in order to ensure that customer expectations are being met on a consistent basis.

CenterPoint replied to the REP Coalition's comments and agreed that this section is the appropriate rule in which to address performance standards related to the various timelines in the TDU tariff.

Commission response

The commission plans to a initiate a separate rulemaking proceeding to address parties' comments and suggestions following the adoption of the revised §25.214 relating to *Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities and the Pro Forma Retail Delivery Tariff*. The commission readopts this section.

§25.89. Report of Loads and Resources.

TXU Wholesale Markets commented that this section should be readopted and amended to reconsider the five-year retention period for all supporting documentation. TXU Wholesale Markets stated that the three-year retention period specified in §25.503(k)(3) is more appropriate.

Commission response

The commission finds the five-year retention period appropriate and therefore declines to amend the rule for the suggested purpose. The commission readopts this section.

§25.90. Market Power Mitigation Plans.

EPE, the REP Coalition, and TXU Wholesale Markets commented that §25.90(b) should be readopted and amended because dates in this subsection have expired.

Additionally, TXU Wholesale Markets noted that the capacity auction referenced in §25.90(c)(3) and (h) will not be regularly conducted after 2006. Consequently, the commission should review the capacity auction methodology that would be employed in the event a more narrowly-tailored capacity auction is necessary to comply with this section. TXU Wholesale Markets added that such a review should include consideration of the future appropriateness of the current auction procedures, the product definitions, and other substantial aspects of the auction rule.

Commission response

The commission anticipates opening §25.90 to address the expiration of the capacity auction. At that time, the commission will consider these issues. The commission readopts this section.

§25.91. Generating Capacity Reports and §25.93. Quarterly Wholesale Electricity Transaction Reports.

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts this section.

Subchapter E. Certification, Licensing and Registration

§25.101. Certification Criteria.

TXU Wholesale Markets commented that this section should be readopted and amended as necessary to reflect the provisions of Senate Bill 20.

Commission response

Project Number 31852 is currently open for the purpose of implementing PURA §39.904 as amended by Senate Bill 20, 79th Legislature, 1st Called Session. The commission will address any changes that may be needed to §25.101 in Project Number 31852. The commission readopts this section.

§25.102. Coastal Management Program and §25.105. Registration and Reporting by Power Marketers.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

The commission readopts this section.

§25.105. Registration and Reporting by Power Marketers.

AEP commented that with some market experience, it is necessary to determine whether the initial Certification requirements are sufficient.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

The commission readopts this section. The commission will conduct an internal review to determine the merits of amending this section and will initiate a separate rulemaking project as deemed necessary.

§25.107. Certification of Retail Electric Providers (REPs).

AEP commented that with some market experience, it is necessary to determine whether the initial Certification requirements are sufficient.

CenterPoint replied to AEP's comments and agreed that this section should be reviewed or reexamined at this time. CenterPoint commented that this section was adopted before the opening of the retail electric market. There are now multiple REPs in the market and experience has demonstrated that the certification requirements do not fully protect other market participants and ERCOT, who are required to deal with REPs as customers or trading partners.

Commission response

The commission will conduct an internal review to determine the merits of amending this section and will initiate a separate rulemaking project as deemed necessary. The commission readopts this section.

§25.109. Registration of Power Generation Companies and Self-Generators.

AEP commented that with some market experience, it is necessary to determine whether the initial Certification requirements are sufficient.

EPE, the REP Coalition, and TXU Wholesale Markets commented that §25.109(a)(3) should be amended because dates in this paragraph are obsolete.

Commission response

When substantive changes are made to §25.109, the commission will address these issues. The commission readopts this section.

Subchapter F. Metering

§25.121. Meter Requirements - §25.127. Generating Station Meters, Instruments, and Records.

The REP Coalition commented that this subchapter should include language assuring that to the extent that the Pro Forma Retail Delivery Tariff (*See* §25.214(d)(1)) is silent on an issue relating to metering, this subchapter is applicable to TDUs as well as other electric utilities. The REP Coalition explained that there are several sections in this subchapter that are not expressly addressed in Pro Forma Retail Delivery Tariff. The REP Coalition stated that the TDUs should still be obligated to adhere to rules that were previously applicable to electric utilities, for example, §25.124(a) Meter tests prior to installation. The REP Coalition also noted that Subchapter F, §25.127(b) should be updated to reflect the fact that TDUs do not own generation plants.

AEP disagreed with the REP Coalition's comments and asserted that Project Number 29637 has been implemented to review the Standard Terms and Conditions for Additional Metering Requirements and that "TDU metering requirements should be located in one place, and that is appropriately the Tariff."

CenterPoint replied that it also does not agree with the REP Coalition's comment that all rules related to Metering in Subchapter F should be automatically made applicable to TDUs, if the TDU Tariff is silent on the issue. CenterPoint stated that considerable effort has been expended to adopt and include metering rules in the Tariff and other commission rules that are applicable to the unbundled market. CenterPoint added that silence in the Tariff does not mean that other rules should automatically apply and that a case by case analysis would have to be made on each individual rule in Subchapter F in order to determine whether it should be made applicable to TDUs.

Commission response

To the extent that there is confusion about the applicability of this section, the commission will consider initiating a separate proceeding to clarify those rules following the conclusion of Project Number 29637. The commission readopts these sections.

Subchapter G . Submetering.

§25.141. Central System or Nonsubmetered Master Metered Utilities and §25.142 Submetering for Apartments, Condominiums, and Mobile Home Parks.

The REP Coalition commented that these sections should be updated to reflect the fact that REPs are now the billing agent for the supply of electricity to premises that are master metered in the deregulated environment.

Commission response

The commission will initiate a separate rulemaking proceeding to address the REP Coalition's comments/suggestions. The commission readopts these sections.

Subchapter H. Electrical Planning.

Division 1. Renewable Energy Resources and Use of Natural Gas.

§25.172. Goal for Natural Gas.

AEP commented that the reporting requirements of this section should be amended. AEP noted that each year the commission has granted a good cause exception to the filing of this report, stating that the data is being provided through other reports.

EPE commented that §25.172(h)(1) and (3) should be amended because the dates in these paragraphs have expired.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

When substantive changes to §25.172 are needed the commission will address these issues. The commission readopts this section.

§25.173. Goal for Renewable Energy.

EPE commented that the goals for renewable energy were revised by Senate Bill 20.

TXU Wholesale Markets commented that this section should be readopted and amended as necessary to implement Senate Bill 20. TXU Wholesale Markets also commented that the current commission procedures in place related to retirement of renewable energy credits to meet the mandate should remain intact but the commission should re-examine calculation of the capacity conversion factor.

Commission response

Project Number 31852 has been initiated to amend this rule as necessitated by Senate Bill 20, 79th Legislature, 1st Called Session, 2005. The commission readopts this section.

Division 2. Energy Efficiency and Customer-Owned Resources

§25.181. Energy Efficiency Goal.

EPE commented that the underlying statute was amended by Senate Bill 712 and the commission may be able to combine amendments related to Senate Bill 712 with the examination required by House Bill 2129.

Commission response

Mandates of Senate Bill 712, 79th Legislature, Regular Session have been addressed in Docket Number 31965 and are currently being addressed in Docket Number 32103. The customer option programs in PURA §31.005 as amended by House Bill 2129 were addressed in Docket 31965. The commission has also hired an expert to review the energy efficiency programs. Amendments to this rule may be proposed after this review is completed. The commission readopts this section.

§25.185. Energy Efficiency Incentive Program for Military Bases.

AEP, EPE and the REP Coalition commented that this section should be repealed because the program goal of 5% reduction in energy consumption by January 1, 2005, has passed.

Commission response

The commission agrees that this section should be repealed and will initiate a separate rulemaking proceeding to address the parties' comments/suggestions.

Subchapter I. Transmission and Distribution

Division 1. Open-Access Comparable Transmission Service for Electric Utilities in the Electric Reliability Council of Texas

§25.191. Transmission Service Requirements - §25.199 Transmission Planning, Licensing, and Cost Recovery for Utilities within ERCOT.

TXU Wholesale Markets commented that §§25.191 - 25.199 should be readopted and suggested that they should be reviewed to examine whether they can be improved to enhance the economic efficiency of generator siting decisions.

TEC explained that subsection (d)(2)(B) of §25.191 was amended in June 2001 and that several parties (including TEC, City of Denton, Tex-La Electric Cooperative and Brazos Electric Power Cooperative) appealed the decision of the commission believing that the amendment created an ambiguity in the rule as to whether entities that have not opted for Customer Choice are required to provide access to their facilities to serve retail customer in violation of PURA §39.203(h). Ultimately, the appeals were dismissed by agreement of the parties, including the commission, upon the commission's agreement to propose an amendment to this section by deleting the last sentence of §25.191(c), and expressly stating that retail customers in multiply certificated service areas who receive service from an electric cooperative or a municipally owned utility that is not offering choice may switch to a different retail electric provider only by disconnecting from the facilities of the electric cooperative or municipally-owned utility and connecting to the facilities of another distribution service provider. TEC stated that the commission should propose a change to this section, as it agreed to do before the Court of Appeals.

Tex-La commented that it supports TEC's comments and requested that the commission propose a change to this section as it agreed to do before the Court of Appeals.

Commission response

The commission will initiate a separate rulemaking project to address this issue. The commission readopts this section.

§25.200. Load Shedding, Curtailments, and Redispatch.

TXU Wholesale Markets commented that this section should be readopted but should be reviewed to determine whether to amend it to reflect a new wholesale market design. TXU Wholesale Markets added that subsection (e) should be deleted as obsolete.

Commission response

The commission will conduct an internal review to determine the merits of amending this section and will initiate a separate rulemaking project as deemed necessary. The commission readopts this section.

§25.202. Commercial Terms for Transmission Service and §25.203 Alternative Dispute Resolution (ADR).

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts these sections.

Division 2. Transmission and Distribution Applicable to All Electric Utilities

§25.215. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice.

The REP Coalition commented that following the conclusion of Project Number 29637, §25.215 may need to be updated to the extent that changes required of TDUs should also appropriately be required of Muni/Co-ops in a customer choice environment.

Commission response

Upon the completion of Project Number 29637, the commission will conduct an internal review to determine the merits of amending this section and will initiate a separate rulemaking project as deemed necessary. The commission readopts this section.

§25.221. Electric Cost Separation.

The REP Coalition commented that this section should be amended since the December 31, 1999 date has expired.

Commission response

When substantive changes are needed for this section, the commission will address this issue. The commission readopts this section.

Subchapter J. Costs, Rates and Tariffs.

Division 1. Retail Rates.

§25.233. Treatment of Integrated Resource Plan Costs.

EPE commented that this section and all cross referenced rules are obsolete; thus the section should be repealed.

Commission response

The commission will initiate a separate rulemaking proceeding to address EPE's comments. The commission readopts this section.

§25.236. Recovery of Fuel Costs.

EPE commented that the affiliate standards in §25.236(d)(1)(B) may require reexamination in light of Senate Bill 1668, and that the schedule in §25.236(g) still references ERCOT utilities and the dates have passed.

Commission response

EPE's comments/suggestions will be considered in Project Number 29630.

§25.237. Fuel Factors.

EPE and Xcel commented that the schedule in §25.237(d) still references ERCOT utilities that no longer are integrated electric utilities and that no longer are subject to this provision.

Xcel commented that electric utilities, such as SPS, are allowed to recover fuel costs from their customers by the use of a fuel factor that may be adjusted as often as once every six months, according to the schedule that is set out in §25.237(d). With the reduced number of electric utilities making filings, Xcel also suggested that it would be appropriate for non-ERCOT companies to file for fuel factor revisions more than two times a year if significant changes in the market warrant more frequent filings, as fuel market fluctuations and impacts on utility fuel costs are much more significant and pronounced now than when the rule was initially implemented. Xcel noted that allowing non-ERCOT companies to file even three times a year, the number of fuel factor filings and fuel surcharge filings would still be significantly reduced and customers would benefit from more timely pricing signals. Xcel added that the ability to make additional filings would also provide a more efficient method for handling fluctuations in fuel prices, minimizing the mismatch between customers who use electricity during a period of under-recovery and customers that ultimately pay a surcharge to make up for the under-recovery.

Xcel also proposed that §25.237 be amended to permit a good-cause exception that would allow an electric utility to file for a surcharge more than twice a year in the event of a material under-collection of

fuel costs. Xcel explained that recent increases in natural gas prices create hardship for the electric utility as well as its customers. Xcel explained that financing a large portion of estimated annual fuel costs puts a strain on utility cash flow and financing, and ultimately an unnecessary burden on ratepayers because it forces customers to pay additional interest that they would not otherwise be required to pay. Furthermore, Xcel noted, delaying a surcharge until the six-month filing window does not provide customers a good price signal and postpones the incentive to conserve. Xcel stated that providing for a good-cause exception is a reasonable approach to dealing with under-collection of fuel costs that dramatically exceed the materiality threshold established in §25.237(a)(3)(B) and that put the electric utility in a continuous state of material under-collection.

Commission response

The ERCOT utilities that are in the rule do not file fuel factor revision. If a substantive change is needed to this rule, the ERCOT utilities will be removed from the rule at that time. The commission disagrees with Xcel's analysis and suggestion that more frequent fuel factor filings would be beneficial to the ratepayers. The commission readopts this section.

§25.242. Arrangements Between Qualifying Facilities and Electric Utilities.

AEP and EPE commented that this section should be reviewed in light of the passage of the Federal Energy Policy Act of 2005. EPE stated that the Act affects relationships between QFs and utilities.

TXU Wholesale Markets commented that this section should be readopted with amendments to reflect the fact that PTB REPs, as referenced in the rule, will no longer exist as of January 1, 2007, and to specify an alternative treatment of the QF output.

Commission response

The commission intends to initiate a separate project to address these issues. The commission readopts this section.

Division 2. Recovery of Stranded Costs

§25.261. Stranded Cost Recovery of Environmental Cleanup Costs and §25.265. Securitization by River Authorities and Electric Cooperatives.

The REP Coalition commented that the requirement of §25.261(e) has expired and this section should be revised or stricken.

Commission response

When substantive changes are needed to this section, the commission will consider this issue. The commission readopts this section.

Subchapter K. Relationships with Affiliates

§25.263. True-up Proceeding.

The REP Coalition commented that this section requires that each electric utility, its affiliated power generation company, and its affiliated REP jointly file a true-up application by commission-determined dates. Each of these dates has passed. Therefore, this section should be revised or stricken.

Commission response

This rule is currently under review in Project Number 32008, where the commission will consider the amendments suggested by the REP Coalition, as deemed necessary.

§25.271. Foreign Utility Company Ownership by Exempt Holding Companies.

AEP and EPE commented that this section should be reviewed in light of the passage of the Federal Energy Policy Act of 2005. EPE stated that the SEC will no longer administer the Public Utility Holding Company Act of 1935.

TXU Wholesale Markets commented that the commission should examine whether this section should be deleted in light of the fact that the Public Utility Holding Act has been repealed.

Commission response

The commission will initiate a separate rulemaking proceeding to address these comments. The commission readopts this section.

§25.272. Code of Conduct for Electric Utilities and Their Affiliates.

TXU Wholesale Markets commented that this section should be readopted and amended. Subsection (c)(8) refers to a holding company as defined by the Public Utility Holding Company Act. The requirement identified in subsection (h)(1) expired by statute and rule on September 1, 2005, and should be deleted as obsolete.

Commission response

When substantive changes are needed to this section, the commission will consider this issue. The commission readopts this section.

§25.273. Contracts Between Electric Utilities and Their Competitive Affiliates.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

The commission readopts this section.

§25.275. Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities.

TXU Wholesale Markets commented that this section should be readopted and amended to reflect that the requirement in subsection (m)(1) expired on September 1, 2005.

Commission response

When this section is opened for substantive changes, the commission will address this issue. The commission readopts this section.

Subchapter L. Nuclear Decommissioning

§25.301. Nuclear Decommissioning Trusts and §25.303. Nuclear Decommissioning Following the Transfer of Texas Jurisdictional Nuclear Generating Plant Assets.

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts these sections.

Subchapter O. Unbundling and Market Power

Division 1. Unbundling

§25.341. Definitions.

TXU Wholesale Markets commented that this section should be readopted and amended as necessary to reflect the changes in metering arrangements enacted through Senate Bill 711/House Bill 2129.

Commission response

The commission has initiated a rulemaking proceeding to address advanced metering and will address parties' comments in that proceeding

or will initiate a separate rulemaking proceeding to address the parties' comments/suggestions. The commission readopts this section.

§25.342. Electric Business Separation, §25.343. Competitive Energy Services, §25.344. Cost Separation Proceedings, §25.345. Recovery of Stranded Costs Through Competition Transition Charge (CTC).

TXU Wholesale Markets commented that these sections should be readopted.

Commission response

The commission readopts these sections.

§25.346. Separation of Electric Utility Metering and Billing Service Costs and Activities.

TXU Wholesale Markets commented that this section should be readopted and amended as necessary to reflect the changes in metering arrangement enacted through Senate Bill 711/House Bill 2129.

Commission response

The commission has initiated a rulemaking proceeding to address advanced metering and will address parties' comments in that proceeding or will initiate a separate rulemaking proceeding to address TXU Wholesale Markets' comments. The commission readopts this section.

Division 2. Independent Organizations.

§25.361. Electric Reliability Council of Texas (ERCOT) and §25.363 ERCOT Fees and Other Rates.

TXU Wholesale Markets commented that these sections should be readopted and amended as necessary to reflect Senate Bill 408.

Commission response

The commission is currently conducting a rulemaking under Project Number 31111 to address issues surrounding the independent market monitor mandated by Senate Bill 408, 79th Legislature, Regular Session. The commission plans to initiate a separate proceeding at a later date to address the additional provisions necessary to comport with the amended statute. The commission readopts this section.

Division 3. Capacity Auction.

§25.381. Capacity Auctions.

TXU Wholesale Markets commented that this section should be repealed and replaced with a rule that is more narrowly tailored to the purposed of voluntary auctions, since the mandate for the capacity auctions regularly conducted pursuant to this rule will cease after 2006.

Commission response

The commission plans to leave this rule in place due to its possible applicability to entities that may enter competition at a later date. Should the commission decide to open the rule for other substantive changes, the commission may consider such revisions. The commission readopts this section.

§25.401. Share of Installed Generation Capacity.

TXU Wholesale Markets commented that this rule should be readopted.

Commission response

The commission readopts this section.

Division 5. Competition in Non-ERCOT Areas.

§25.421. Transition to Competition for a Certain Area Outside the Electric Reliability Council of Texas Region.

TXU Wholesale Markets commented that this section should be readopted.

Commission response

The commission readopts this section.

Subchapter P. Pilot Projects

§25.431. Retail Competition Pilot Projects.

The REP Coalition commented that unless the commission has specific plans to use this rule for utilities yet to enter competition, it should be repealed. The Coalition notes that, given the unique circumstances of each non-ERCOT utility, a customized solution may be required for each of the relevant power regions.

AEP disagreed with the REP Coalition's commented that this section should be repealed. AEP responded to the REP Coalition's suggestion that both Southwestern Electric Power Company and Mutual Energy SPP have open pilot projects under this rule.

Commission response

The commission agrees with AEP that these two pilot projects are currently open, and this rule should not be repealed. The commission readopts this section.

Subchapter Q. System Benefit Fund

§25.453. Targeted Energy Efficiency Programs.

EPE and the REP Coalition commented that §25.453(c) should be amended because the dates in this subsection have expired.

Commission response

Amendments to this rule may be proposed after the review of energy efficiency programs is completed. The commission readopts this section.

Subchapter R. Customer Protection Rules for Retail Electric Service

Prepaid Electric Service

The REP Coalition commented that there exists a clear need for the commission's customer protection rules to address a model for prepaid electric service. Although REPs have been certified (specifically the Applications of Pre-Buy Electric and PRElectric for REP Certification, Docket Numbers 30072 and 30855), this has accomplished through settlement, rather than in a finding that a prepay model is viable under the existing customer protection rules. The REP Coalition adds that the issue inherent in crafting a prepay model under the current customer protection rules is readily found by examining the "Pay in Advance" option found in the pro forma terms of service for a Provider of Last Resort. The REP Coalition asserted that this section is internally inconsistent, noting that paragraph (10) allows a disconnect notice to be sent concurrently with an invoice, and paragraph (9) authorizes disconnection for nonpayment within 10 days of receipt of such an invoice/notice. However, paragraph (4) provides that payment is not delinquent until the 16th day after issuance of an invoice.

Commission response

The commission agrees with the REP Coalition that customer protection rules should at some point in the future provide a model for prepaid service. The commission readopts this section.

§25.474. Selection or Change of Retail Electric Provider.

The REP Coalition commented that the sample letter of authorization (LOA) provided in §25.474(e)(6) does not comply with the written rule. For example, the sample does not contain a field to capture the applicants' account access verification data. Therefore, the sample LOA should be corrected to include the required information.

Commission response

The commission agrees that the sample LOA in §25.484(e)(7), which the commission believes the REP Coalition referred to as subsection (e)(6), does not contain the information required by §25.474(e)(6), but notes that the rule allows modifications of the sample LOA, provided that the requirements of subsection (e) are met. The commission plans to initiate a separate proceeding to address this issue. The commission readopts this section.

§25.475. Information Disclosures to Residential and Small Commercial Customers.

The REP Coalition commented that the statement required to be made when a REP makes a specific comparison claim with respect to a product offered by another REP should be revised to make its use consistent across all advertising media. With regard to television, radio, outdoor and internet advertisements, the disclaimer begins "You can obtain...", yet with regard to print advertisements, it begins "You may obtain..." Furthermore, the REP Coalition noted, the rule allows the phone number not to be included in the disclaimer statement on an outdoor advertisement if such outdoor advertisement already includes REP's phone number. This exception should also be made for the website address that is included in the disclaimer if it is already included in the advertisement, and the exception should apply to television and radio, print and internet advertisements as well, the REP Coalition asserted. The REP Coalition stated that regardless of the medium, if an advertisement clearly contains the REP's phone number and website, this information should not be required to be repeated in the disclaimer; and that this exception is particularly relevant in television and radio advertisements where screen space is limited. In addition, the REP Coalition commented the sample electricity facts label provided in §25.475(f)(6) does not comply with the written rule.

Commission response

The commission will initiate a separate proceeding to address these issues. The commission readopts this section.

§25.478. Credit Requirements and Deposits.

The REP Coalition commented that §25.478(j) should be amended because the date in this subsection has expired.

Commission response

Project Number 31417 is currently open and the commission will incorporate the amendments suggested by the REP Coalition, as necessary. The commission readopts this section.

§25.482. Termination of Service.

EPE commented that this section should be amended because several subsections contain dates that have expired.

The REP Coalition commented that given that the vast majority of REPs are disconnecting for nonpayment, there is a very limited need to retain this section. For those REPs who operate under §25.483, there are only portions of two subsections in this section that would need to be retained: subsection (d), relating to termination due to abandonment by the REP, and subsection (i)(2) and (3), relating to a customer's right to terminate a contract without penalty. The REP Coalition commented that these sections should be moved to other rules, such as possibly to §25.475, relating to Information Disclosures to Residential and Small Commercial Customers, so that §25.482 would clearly only apply to REPs that are not disconnecting for nonpayment. Additionally the REP Coalition asserted, the applicability of this section should be amended to apply only to REPs who do not have disconnect authority under §25.483.

Commission response

The commission will initiate a separate rulemaking proceeding to consider the parties' comments. The commission readopts this section.

§25.483. Disconnection of Service.

EPE commented that this section should be amended because several subsections contain dates that have expired.

The REP Coalition commented that subsection (b) of this section contains language that should be deleted, given that REPs now have the disconnect authority. The notice set forth in subsection (b) appears to be no longer necessary. Alternately, if the commission decides to retain the notice requirement, the language should be modified to reflect the passing of the date of June 1, 2004 so that the notice reads: "As of June 1, 2004, the PUC allowed..."

Commission response

The commission will initiate a separate rulemaking proceeding to consider the parties' comments. The commission readopts this section.

§25.487. Obligations Related to Move-In Transactions.

EPE and the REP Coalition commented that this section should be amended because the sunset review date of March 1, 2004 has passed. The REP Coalition added that a new sunset review date should be included to the extent the market participants feel the safety net process is still necessary.

CenterPoint replied that it believes that because the date established in this section for a sunset review of the Safety Net Process has passed, the sunset review of this section should be undertaken as soon as possible.

Commission response

The commission will initiate a separate rulemaking proceeding to review the applicability and necessity of the rule in the current market and may amend the rule to address the parties' comments as deemed appropriate. The commission readopts this section.

§25.488. Procedures for a Premise with No Service Agreement.

The REP Coalition commented that consistency on disconnect policy also requires modifications to this section. First, the REP Coalition noted, with the implementation of disconnect authority for all REPs, this section needs to be amended to allow all REPs to disconnect residential and small commercial customers rather than requiring non-affiliated REPs to terminate those customers to the affiliate REP; and second, because there is no reason to have one policy for how to handle premises with no contract where the REP discovers that the occupant is receiving service without a service agreement (as in this section) and a *different* policy for situations where a REP is serving a customer who does not have a contract because the contract has expired (proposed to be a transfer to POLR in §25.482(b)(2)). The REP Coalition urged the commission to modify this section to apply to any circumstance in which the REP is serving a customer without a service agreement. The REP Coalition recommended that this section be reopened in a subsequent rulemaking to make certain amendments as laid out in its comments.

Commission response

The commission will initiate a separate rulemaking proceeding to address the REP Coalition's comments. The commission readopts this section.

§25.489. Treatment of Premises with No Retail Electric Provider of Record.

The REP Coalition commented that a sunset review of this rule may be appropriate as the Move In, Move Out (MIMO) and safety net processes are working effectively and should make this rule moot.

AEP responded that it agreed and added that following the successful implementation of TX SET 2.0, to effectively handle out of sequence order processing, the requirement to continue the safety net process is no longer necessary and should be used only in emergency situations.

CenterPoint replied that it does not agree with the suggestion that the rule may be moot and added that there are still instances in which a premises is found to be energized without a REP of record, and there needs to be a mechanism in the rules to address the situation.

Commission response

Due to the fact that a TDU is still finding instances in which the rule must be applied, the commission does not find it appropriate to sunset the rule at this time. However, the commission may conduct a review to determine an appropriate date on which to re-evaluate the necessity for this rule. The commission readopts this section.

Subchapter S. Wholesale Markets

§25.501. Wholesale Market Design for the ERCOT.

TXU Wholesale Markets commented that this section should readopted and amended as necessary to reflect commission decisions regarding implementation.

Commission response

The commission will initiate a separate rulemaking proceeding to address TXU Wholesale Markets' comments. The commission readopts this section.

§25.502. Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas and §25.503. Oversight of Wholesale Market Participants.

TXU Wholesale Markets commented that these sections should be readopted but added that support for readoption does not imply support of the substance of the rules as they exist today.

Commission response

The commission readopts these sections.

All comments, including any not specifically referenced herein, were fully considered by the commission.

The commission readopts Chapter 25, Substantive Rules Applicable to Electric Service Providers, pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and Texas Government Code §2001.039 which requires each state agency to review and readopt its rules every four years.

Cross Reference to Statutes: Texas Utilities Code Annotated, Title II, Public Utility Regulatory Act, and Title IV, Chapters 161, 163, 181, 182, 183, 184, and 185.

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §25.1. Purpose and Scope of Rules.

16 TAC §25.2. Cross-Reference Transition Provision.

16 TAC §25.3. Severability Clause.

16 TAC §25.4. Statement of Nondiscrimination.

16 TAC §25.5. Definitions.

16 TAC §25.6. Cost of Copies of Public Information.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.21. General Provisions of Customer Service and Protection Rules.

16 TAC §25.22. Request for Service.

16 TAC §25.23. Refusal of Service.

16 TAC §25.24. Credit Requirements and Deposits.

16 TAC §25.25. Issuance and Format of Bills.

16 TAC §25.26. Spanish Language Requirements.

16 TAC §25.27. Retail Electric Service Switchovers.

16 TAC §25.28. Bill Payment and Adjustments.

16 TAC §25.29. Disconnection of Service.

16 TAC §25.30. Complaints.

16 TAC §25.31. Information to Applicants and Customers.

16 TAC §25.41. Price to Beat.

16 TAC §25.43. Provider of Last Resort (POLR).

SUBCHAPTER C. QUALITY OF SERVICE

16 TAC §25.51. Power Quality.

16 TAC §25.52. Reliability and Continuity of Service.

16 TAC §25.53. Emergency Operations Plan.

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §25.71. General Procedures, Requirements and Penalties.

16 TAC §25.72. Uniform System of Accounts.

16 TAC §25.73. Financial and Operating Reports.

16 TAC §25.74. Reports on Sale of Property and Mergers.

16 TAC §25.75. Reports on Sale of 50% or more of Stock.

16 TAC §25.76. Gross Receipts Assessment Report.

16 TAC §25.77. Payments, Compensation, and Other Expenditures.

16 TAC §25.78. State Agency Utility Account Information.

16 TAC §25.79. Equal Opportunity Reports.

16 TAC §25.80. Annual Report on Historically Underutilized Businesses.

16 TAC §25.81. Service Quality Reports.

16 TAC §25.82. Fuel Cost and Use Information.

16 TAC §25.83. Transmission Construction Reports.

16 TAC §25.84. Annual Reporting of Affiliate Transactions for Electric Utilities.

16 TAC §25.85. Report of Workforce Diversity and Other Business Practices.

16 TAC §25.87. Distribution Unbundling Reports.

16 TAC §25.88. Retail Market Performance Measure Reporting.

16 TAC §25.89. Report of Loads and Resources.

16 TAC §25.90. Market Power Mitigation Plans.

16 TAC §25.91. Generating Capacity Reports.

16 TAC §25.93. Quarterly Wholesale Electricity Transaction Reports.

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.101. Certification Criteria.

16 TAC §25.102. Coastal Management Program.

16 TAC §25.105. Registration and Reporting by Power Marketers.

16 TAC §25.107. Certification of Retail Electric Providers (REPs).

16 TAC §25.108. Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges.

16 TAC §25.109. Registration of Power Generation Companies and Self-Generators.

16 TAC §25.111. Registration of Aggregators.

16 TAC §25.113. Municipal Registration of Retail Electric Providers (REPs).

SUBCHAPTER F. METERING

16 TAC §25.121. Meter Requirements.

16 TAC §25.122. Meter Records.

16 TAC §25.123. Meter Readings.

16 TAC §25.124. Meter Testing.

16 TAC §25.125. Adjustments Due to Meter Errors.

16 TAC §25.126. Meter Tampering.

16 TAC §25.127. Generating Station Meters, Instruments, and Records.

16 TAC §25.128. Interconnection Meters and Circuit Breakers.

16 TAC §25.129. Pulse Metering.

16 TAC §25.131. Load Profiling and Load Research.

SUBCHAPTER G. SUBMETERING

16 TAC §25.141. Central System or Nonsubmetered Master Metered Utilities.

16 TAC §25.142. Submetering for Apartments, Condominiums, and Mobile Home Parks.

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

16 TAC §25.172. Goal for Natural Gas.

16 TAC §25.173. Goal for Renewable Energy.

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §25.181. Energy Efficiency Goal.

16 TAC §25.182. Energy Efficiency Grant Program.

16 TAC §25.183. Reporting and Evaluation of Energy Efficiency Programs.

16 TAC §25.184. Energy Efficiency Implementation Project.

16 TAC §25.185. Energy Efficiency Incentive Program for Military Bases.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 1. OPEN-ACCESS COMPARABLE TRANSMISSION SERVICE FOR ELECTRIC UTILITIES IN THE ELECTRIC RELIABILITY COUNCIL OF TEXAS

16 TAC §25.191. Transmission Service Requirements.

16 TAC §25.192. Transmission Service Rates.

16 TAC §25.193. Distribution Service Provider Transmission Cost Recovery Factors (TCRF).

16 TAC §25.195. Terms and Conditions for Transmission Service.

16 TAC §25.196. Standards of Conduct.

16 TAC §25.198. Initiating Transmission Service.

16 TAC §25.199. Transmission Planning, Licensing and Cost-Recovery for Utilities within the Electric Reliability Council of Texas.

16 TAC §25.200. Load Shedding, Curtailments, and Redispatch.

16 TAC §25.202. Commercial Terms for Transmission Service.

16 TAC §25.203. Alternative Dispute Resolution (ADR).

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.211. Interconnection of On-Site Distributed Generation (DG).

16 TAC §25.212. Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation.

16 TAC §25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

16 TAC §25.215. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice.

16 TAC §25.221. Electric Cost Separation.

16 TAC §25.223. Unbundling of Energy Service.

16 TAC §25.227. Electric Utility Service for Public Retail Customers.

SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 1. RETAIL RATES

16 TAC §25.231. Cost of Service.

16 TAC §25.232. Adjustment for House Bill 11, Acts of 72nd Legislature, First Called Special Session 1991.

16 TAC §25.233. Treatment of Integrated Resource Plan Costs.

16 TAC §25.234. Rate Design.

16 TAC §25.235. Fuel Costs--General.

16 TAC §25.236. Recovery of Fuel Costs.

16 TAC §25.237. Fuel Factors.

16 TAC §25.238. Power Cost Recovery Factors (PCRF).

16 TAC §25.240. Contribution Disclosure Statements in Appeals of Municipal Utility Rates.

16 TAC §25.241. Form and Filing of Tariffs.

16 TAC §25.242. Arrangements Between Qualifying Facilities and Electric Utilities.

16 TAC §25.251. Renewable Energy Tariff.

DIVISION 2. RECOVERY OF STRANDED COSTS

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TRD-200601300

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 1, 2006

♦ ♦ ♦

Texas Board of Veterinary Medical Examiners

Title 22, Part 24

The Texas Board of Veterinary Medical Examiners ("the Board") adopts without changes the rule review proposed for Chapter 571, Licensing; Chapter 573, Rule of Professional Conduct; Chapter 575, Practice and Procedure; and Chapter 577, General Administrative Duties, Title 22, Part 24, of the Texas Administrative Code. Notice of the proposed intent to review and a request for comments were published in the December 2, 2005, issue of the *Texas Register* (30 TexReg 8183).

The Board received no comment with respect to these rules. The Board believes that the original justification for adoption of these rules continues to exist and re-adopts all sections in Chapters 571, 573, 575, and 577 without changes, pursuant to the requirements of §2001.039, Government Code.

TRD-200601036
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Filed: February 27, 2006

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 1 TAC §55.120(a)

NATIONAL MEDICAL SUPPORT NOTICE
PART A
NOTICE TO WITHHOLD FOR HEALTH CARE COVERAGE

This Notice is issued under Section 466(a)(19) of the Social Security Act, section 609(a)(5)(C) of the Employee Retirement Income Security Act of 1974 (ERISA), and for State and local government and church plans, sections 401(e) and (f) of the Child Support Performance and Incentive Act of 1998.

Issuing Agency: _____	Court or Administrative Authority: _____
Issuing Agency Address: _____ _____	Date of Support Order: ____/____/____
Date of Notice: ____/____/____	Support Order Number: _____
Case Number: _____	
Telephone Number: _____	
FAX Number: _____	

_____) RE* _____
Employer/Withholder's Federal EIN Number — Employee's Name (Last, First, MI)

_____) _____
Employer's/Withholder's Name — Employee's Social Security Number

_____) _____
Employer's/Withholder's Address — Employee's Mailing Address

_____)
Custodial Parent's Name (Last, First, MI)

_____) _____
Custodial Parent's Mailing Address — Substituted Official/Agency Name and Address

_____)
Child(ren)s Mailing Address (if different from Custodial Parent's)

_____)
_____)
_____)
Name, Mailing Address, and Telephone Number of a Representative of the Child(ren)

Child(ren)'s Name	DOB	SSN	Child(ren)'s Name	DOB	SSN
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

The order requires the child(ren) to be enrolled in [ ] any health coverages available; or [ ] only the following coverage(s):
___ Medical ___ Dental ___ Vision ___ Prescription Drug ___ Mental Health ___ Other (specify):

THE PAPERWORK REDUCTION ACT OF 1995 (P.L. 104-13) Public reporting burden for this collection of information is estimated to average 10 minutes per response, inclouding the tinme reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB control number: 0970-0222. Expiration Date: 02/29/2008

Employer Name: _____ Non-Custodial Parent: _____
Non-Custodial Parent SSN: _____
Employer Federal EIN: _____ OAG Case Number: _____
Cause Number: _____

NATIONAL MEDICAL SUPPORT NOTICE-MEDICAL SUPPORT WITHHOLDING-PART A

EMPLOYER RESPONSE

If either 1, 2, or 3 below applies, check the appropriate box and return this Part A to the Issuing Agency within 20 business days after the date of the Notice, or sooner if reasonable. NO OTHER ACTION IS NECESSARY. If neither 1, 2, nor 3 applies, forward Part B to the appropriate plan administrator(s) within 20 business days after the date of the Notice, or sooner if reasonable. Check number 4 and return this Part A to the Issuing Agency, listed below, if the Plan Administrator informs you that the child(ren) is/are enrolled in an option under the plan for which you have determined that the employee contribution exceeds the amount that may be withheld from the employee's income due to State or Federal withholding limitations and/or prioritization.

[ ] 1. Employer does not maintain or contribute to plans providing dependent or family health care coverage.

[ ] 2. The employee is among a class of employees (for example, part-time or non-union) that are not eligible for family health coverage under any group health plan maintained by the employer or to which the employer contributes.

[ ] 3. Health care coverage is not available because employee is no longer employed by the employer:

Date of termination: _____

Last known address: _____

Last known telephone number: _____

New employer (if known): _____

New employer address: _____

New employer telephone number: _____

[ ] 4. State or Federal withholding limitations and/or prioritization prevent the withholding from the employee's income of the amount required to obtain coverage under the terms of the plan.

Employer Representative:

Name: _____ Telephone Number: _____

Title: _____ Date: _____

EIN (if not provided by the Issuing Agency on Notice to Withhold for Health Care Coverage): _____

ISSUING AGENCY:

Employer Name: _____

Employer Federal EIN: _____

Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

NATIONAL MEDICAL SUPPORT NOTICE-MEDICAL SUPPORT WITHHOLDING-PART A

INSTRUCTIONS TO EMPLOYER

This document serves as notice that the employee identified on this National Medical Support Notice is obligated by a court or administrative child support order to provide health care coverage for the child(ren) identified on this Notice. This National Medical Support Notice replaces any Medical Support Notice that the Issuing Agency has previously served on you with respect to the employee and the children listed on this Notice. If the employee already has enrolled the child(ren) in health care coverage, the employer should contact the issuing agency to provide coverage information.

The document consists of **Part A - Notice to Withhold for Health Care Coverage** for the employer to withhold any employee contributions required by the group health plan(s) in which the child(ren) is/are enrolled; and **Part B - Medical Support Notice to the Plan Administrator**, which must be forwarded to the administrator of each group health plan identified by the employer to enroll the eligible child(ren), or completed by the employer, if the employer serves as the health plan administrator.

EMPLOYER RESPONSIBILITIES

1. If the individual named above is not your employee, or if family health care coverage is not available, please complete item 1, 2, or 3 of the Employer Response as appropriate, and return it to the Issuing Agency. **NO FURTHER ACTION IS NECESSARY.**

2. If family health care coverage is available for which the child(ren) identified above may be eligible, you are required to:

   a. Transfer, not later than 20 business days after the date of this Notice, a copy of **Part B - Medical Support Notice to the Plan Administrator** to the administrator of each appropriate group health plan for which the child(ren) may be eligible, and

   b. Upon notification from the plan administrator(s) that the child(ren) is/are enrolled, either

      1) withhold from the employee's income any employee contributions required under each group health plan, in accordance with the applicable law of the employee's principal place of employment and transfer employee contributions to the appropriate plan(s), or

      2) complete item 4 of the Employer Response to notify the Issuing Agency that enrollment cannot be completed because of prioritization or limitations on withholding.

   c. If the plan administrator notifies you that the employee is subject to a waiting period that expires more than 90 days from the date of its receipt of **Part B** of this Notice, or whose duration is determined by a measure other than the passage of time (for example, the completion of a certain number of hours worked), notify the issuing agency of the enrollment timeframe and notify the plan administrator when the employee is eligible to enroll in the plan and that this Notice requires the enrollment of the child(ren) named in the Notice in the plan.

Employer Name: _____ Non-Custodial Parent: _____

Employer Federal EIN: _____ Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

LIMITATIONS ON WITHHOLDING

The total amount withheld for both cash and medical support cannot exceed the applicable Consumer Credit Protection Act (CCPA) percentage (%) of the employee's aggregate disposable weekly earnings. The employer may not withhold more under this National Medical Support Notice than the lesser of:

1. The amounts allowed by the Federal Consumer Credit Protection Act (15 U.S.C., section 1673(b));

2. The amounts allowed by the State of the employee's principal place of employment; or

3. The amounts allowed for health insurance premiums by the child support order, as indicated here: _____.

The Federal limit applies to the aggregate disposable weekly earnings (ADWE). ADWE is the net income left after making mandatory deductions such as State, Federal, local taxes; Social Security taxes; and Medicare taxes. As required under section 2.b.2 of the Employer Responsibilities on prior page, complete item 4 of the Employer Response to notify the Issuing Agency that enrollment cannot be completed because of prioritization or limitations on withholding.

PRIORITY OF WITHHOLDING

If withholding is required for employee contributions to one or more plans under this notice and for a support obligation under a separate notice and available funds are insufficient for withholding for both cash and medical support contributions, the employer must withhold amounts for purposes of cash support and medical support contributions in accordance with the law, if any, of the State of the employee's principal place of employment requiring prioritization between cash and medical support, as described here: Texas law requires that the employee contributions for health insurance are withheld first before withholding for cash support (cash child support, cash medical support, or cash spousal support). [TFC § 101.010] If an employer is faced with two or more NMSNs and cannot comply with all of the notices, he should comply with the notices in the order in which they were first received. As required under section 2.b.2 of the Employer Responsibilities on prior page, complete item 4 of the Employer Response to notify the Issuing Agency that enrollment cannot be completed because of prioritization or limitations on withholding.

DURATION OF WITHHOLDING

The child(ren) shall be treated as dependents under the terms of the plan. Coverage of a child as a dependent will end when similarly situated dependents are no longer eligible for coverage under the terms of the plan. However, the continuation coverage provisions of ERISA may entitle the child to continuation coverage under the plan. The employer must continue to withhold employee contributions and may not dis-enroll (or eliminate coverage for) the child(ren) unless:

1. The employer is provided satisfactory written evidence that:

   a. The court or administrative child support order referred to above is no longer in effect; or
   b. The child(ren) is or will be enrolled in comparable coverage which will take effect no later than the effective date of dis-enrollment from the plan; or

2. The employer eliminates family health coverage for all of its employees.

Employer Name: _____ Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

Employer Federal EIN: _____ OAG Case Number: _____

Cause Number: _____

POSSIBLE SANCTIONS

An employer may be subject to sanctions or penalties imposed under State law and/or ERISA for discharging an employee from employment, refusing to employ, or taking disciplinary action against any employee because of medical child support withholding, or for failing to withhold income, or transmit such withheld amounts to the applicable plan(s) as the Notice directs.

NOTICE OF TERMINATION OF EMPLOYMENT

In any case in which the above employee's employment terminates, the employer must promptly notify the Issuing Agency listed below of such termination. This requirement may be satisfied by sending to the Issuing Agency a copy of any notice the employer is required to provide under the continuation coverage provisions of ERISA or the Health Insurance Portability and Accountability Act.

EMPLOYEE LIABILITY FOR CONTRIBUTION TO PLAN

The employee is liable for any employee contributions that are required under the plan(s) for enrollment of the child(ren) and is subject to appropriate enforcement. The employee may contest the withholding under this Notice based on a mistake of fact (such as the identity of the obligor). Should an employee contest the withholding under this Notice, the employer must proceed to comply with the employer responsibilities in this Notice until notified by the Issuing Agency to discontinue withholding. To contest the withholding under this Notice, the employee should contact the Issuing Agency at the address and telephone number listed below on the Notice. With respect to plans subject to ERISA, it is the view of the Department of Labor that Federal Courts have jurisdiction if the employee challenges a determination that the Notice constitutes a Qualified Medical Child Support Order.

CONTACT FOR QUESTIONS

If you have any questions regarding this Notice, you may contact the Issuing Agency at the address and telephone number listed below.

ISSUING AGENCY:

Employer Name: _____

Employer Federal EIN: _____

Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

NATIONAL MEDICAL SUPPORT
PART B
MEDICAL SUPPORT NOTICE TO PLAN ADMINISTRATOR

This Notice is issued under Section 466(a)(19) of the Social Security Act, section 609(a)(5)(C) of the Employee Retirement Income Security Act of 1974 , and for State and local government and church plans, sections 401(e) and (f) of the Child Support Performance and Incentive Act of 1998. Receipt of this Notice from the Issuing Agency constitutes receipt of a Medical Child Support Order under applicable law. The rights of the parties and the duties of the plan administrator under this Notice are in addition to the existing right and duties established under such law.

Issuing Agency: _____ Issuing Agency Address: _____ _____ Date of Notice: ____/____/____ Case Number: _____ Telephone Number: _____ FAX Number: _____	Court or Administrative Authority: _____ Date of Support Order: ____/____/____ Support Order Number: _____

_____) RE* _____
Employer/Withholder's Federal EIN Number — Employee's Name (Last, First, MI)

_____) _____
Employer's/Withholder's Name — Employee's Social Security Number

_____) _____
Employer's/Withholder's Address — Employee's Mailing Address

_____)
Custodial Parent's Name (Last, First, MI)

_____) _____
Custodial Parent's Mailing Address — Substituted Official/Agency Name and Address

_____)
Child(ren)s Mailing Address (if different from Custodial Parent's)

_____)
_____)
_____)
Name, Mailing Address, and Telephone Number of a Representative of the Child(ren)

Child(ren)'s Name	DOB	SSN	Child(ren)'s Name	DOB	SSN
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

The order requires the child(ren) to be enrolled in [ ] any health coverages available; or [ ] only the following coverage(s):
___ Medical ___ Dental ___Vision ___ Prescription Drug ___ Mental Health ___ Other (specify):

Employer Name: _____
Employer Federal EIN: _____

Non-Custodial Parent: _____
Non-Custodial Parent SSN: _____
OAG Case Number: _____
Cause Number: _____

NATIONAL MEDICAL SUPPORT NOTICE TO PLAN ADMINISTRATOR RESPONSE

PLAN ADMINISTRATOR RESPONSE

(To be completed and returned to the Issuing Agency, listed below, within 40 business days after the date of the Notice, or sooner if reasonable)

This Notice was received by the plan administrator on _____.

☐ 1. This Notice was determined to be a "qualified medical child support order," on _____. Complete **Response 2 or 3, and 4**, if applicable.

☐ 2. The participant (employee) and alternate recipient(s) (child(ren)) are to be enrolled in the following family coverage.
☐ a. The child(ren) is/are currently enrolled in the plan as a dependent of the participant.
☐ b. There is only one type of coverage provided under the plan. The child(ren) is/are included as dependents of the participant under the plan.
☐ c. The participant is enrolled in an option that is providing dependent coverage and the child(ren) will be enrolled in the same option.
☐ d. The participant is enrolled in an option that permits dependent coverage that has not been elected; dependent coverage will be provided.

Coverage is effective as of ____/____/_____(includes waiting period of less than 90 days from date of receipt of this Notice). The child(ren) has/have been enrolled in the following option: _____. Any necessary withholding should commence if the employer determines that it is permitted under State and Federal withholding and/or prioritization limitations.

☐ 3. There is more than one option available under the plan and the participant is not enrolled. The Issuing Agency must select from the available options. Each child is to be included as a dependent under one of the available options that provide family coverage. If the Issuing Agency does not reply within 20 business days of the date this Response is returned, the child(ren), and the participant if necessary, will be enrolled in the plan's default option, if any: _____.

☐ 4. The participant is subject to a waiting period that expires ____/____/_____ (more than 90 days from the date of receipt of this Notice), or has not completed a waiting period which is determined by some measure other than the passage of time, such as the completion of a certain number of hours worked (describe here: _____). At the completion of the waiting period, the plan administrator will process the enrollment.

☐ 5. This Notice does not constitute a "qualified medical child support order" because:
☐ The name of the [ ] child(ren) or [ ] participant is unavailable.
☐ The mailing address of the [ ] child(ren) (or a substituted official) or [ ] participant is unavailable.
☐ The following child(ren) is/are at or above the age at which dependents are no longer eligible for coverage under the plan_____ [insert name(s) of child(ren)].

Plan Administrator or Representative:

Name: _____ Telephone Number: _____

Title: _____ Date: _____

Address: _____

ISSUING AGENCY:

Employer Name: _____ Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

Employer Federal EIN: _____ OAG Case Number: _____

Cause Number: _____

NATIONAL MEDICAL SUPPORT NOTICE TO PLAN ADMINISTRATOR RESPONSE

INSTRUCTIONS TO PLAN ADMINISTRATOR

This Notice has been forwarded from the employer identified above to you as the plan administrator of a group health plan maintained by the employer (or a group health plan to which the employer contributes) and in which the non-custodial parent/participant identified above is enrolled or is eligible for enrollment.

This Notice serves to inform you that the non-custodial parent/participant is obligated by an order issued by the court or agency identified above to provide health care coverage for the child(ren) under the group health plan(s) as described on **Part B**.

(A) If the participant and child(ren) and their mailing addresses (or that of a Substituted Official or Agency) are identified above, and if coverage for the child(ren) is or will become available, this Notice constitutes a "qualified medical child support order" (QMCSO) under ERISA or CSPIA, as applicable. (If any mailing address is not present, but it is reasonably accessible, this Notice will not fail to be a QMCSO on that basis.) You must, within 40 business days of the date of this Notice, or sooner if reasonable:

(1) Complete **Part B** - Plan Administrator Response - and send it to the Issuing Agency:

(a) if you checked Response 2:

(i) notify the non-custodial parent/participant named above, each named child, and the custodial parent that coverage of the child(ren) is or will become available (notification of the custodial parent will be deemed notification of the child(ren) if they reside at the same address);

(ii) furnish the custodial parent a description of the coverage available and the effective date of the coverage, including, if not already provided, a summary plan description and any forms, documents, or information necessary to effectuate such coverage, as well as information necessary to submit claims for benefits;

(b) if you checked Response 3:

(i) if you have not already done so, provide to the Issuing Agency copies of applicable summary plan descriptions or other documents that describe available coverage including the additional participant contribution necessary to obtain coverage for the child(ren) under each option and whether there is a limited service area for any option;

(ii) if the plan has a default option, you are to enroll the child(ren) in the default option if you have not received an election from the Issuing Agency within 20 business days of the date you returned the Response. If the plan does not have a default option, you are to enroll the child(ren) in the option selected by the Issuing Agency.

(c) if the participant is subject to a waiting period that expires more than 90 days from the date of receipt of this Notice, or has not completed a waiting period whose duration is determined by a measure other than the passage of time (for example, the completion of a certain number of hours worked), complete Response 4 on the Plan Administrator Response and return to the employer and the Issuing Agency, and notify the participant and the custodial parent; and upon satisfaction of the period or requirement, complete enrollment under Response 2 or 3, and

Employer Name: _____

Employer Federal EIN: _____

Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

(d) upon completion of the enrollment, transfer the applicable information on **Part B** - Plan Administrator Response to the employer for a determination that the necessary employee contributions are available. Inform the employer that the enrollment is pursuant to a National Medical Support Notice.

(B) If within 40 business days of the date of this Notice, or sooner if reasonable, you determine that this Notice does not constitute a QMCSO, you must complete Response 5 of Part B - Plan Administrator Response and send it to the Issuing Agency, and inform the non-custodial parent/participant, custodial parent, and child(ren) of the specific reasons for your determination.

(C) Any required notification of the custodial parent, child(ren) and/or participant that is required may be satisfied by sending the party a copy of the Plan Administrator Response, if appropriate.

UNLAWFUL REFUSAL TO ENROLL

Enrollment of a child may not be denied on the ground that: (1) the child was born out of wedlock; (2) the child is not claimed as a dependent on the participant's Federal income tax return; (3) the child does not reside with the participant or in the plan's service area; or (4) because the child is receiving benefits or is eligible to receive benefits under the State Medicaid plan. If the plan requires that the participant be enrolled in order for the child(ren) to be enrolled, and the participant is not currently enrolled, you must enroll both the participant and the child(ren). All enrollments are to be made without regard to open season restrictions.

PAYMENT OF CLAIMS

A child covered by a QMCSO, or the child's custodial parent, legal guardian, or the provider of services to the child, or a State agency to the extent assigned the child's rights, may file claims and the plan shall make payment for covered benefits or reimbursement directly to such party.

PERIOD OF COVERAGE

The alternate recipient(s) shall be treated as dependents under the terms of the plan. Coverage of an alternate recipient as a dependent will end when similarly situated dependents are no longer eligible for coverage under the terms of the plan. However, the continuation coverage provisions of ERISA or other applicable law may entitle the alternate recipient to continue coverage under the plan. Once a child is enrolled in the plan as directed above, the alternate recipient may not be dis-enrolled unless:

(1) The plan administrator is provided satisfactory written evidence that either:

(a) the court or administrative child support order referred to above is no longer in effect, or

(b) the alternate recipient is or will be enrolled in comparable coverage which will take effect no later than the effective date of dis-enrollment from the plan;

(2) The employer eliminates family health coverage for all of its employees; or

(3) Any available continuation coverage is not elected, or the period of such coverage expires.

Employer Name: _____

Employer Federal EIN: _____

Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

CONTACT FOR QUESTIONS

If you have any questions regarding this Notice, you may contact the Issuing Agency at the address and telephone number listed below.

Paperwork Reduction Act Notice

The Issuing Agency asks for the information on this form to carry out the law as specified in the Employee Retirement Income Security Act or the Child Support Performance and Incentive Act, as applicable. You are required to give the Issuing Agency the information. You are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Issuing Agency needs the information to determine whether health care coverage is provided in accordance with the underlying child support order. The Average time needed to complete and file the form is estimated below. These times will vary depending on the individual circumstances.

	Learning about the law or the form	Preparing the form
First Notice	1 hr.	1 hr., 45 min.
Subsequent Notices	----	35 min.

ISSUING AGENCY:

Employer Name: _____

Employer Federal EIN: _____

Non-Custodial Parent: _____

Non-Custodial Parent SSN: _____

OAG Case Number: _____

Cause Number: _____

Figure: 16 TAC §25.43(f)(1)(A)

Standard Terms of Service ~~Agreement~~

[*Insert POLR Provider Name*] (Certificate No. ____)
Provider of Last Resort (POLR) Residential Service

This Standard Terms of Service ~~Agreement~~ applies to residential customers receiving Provider of Last Resort (POLR) service from [*insert POLR Provider name*] under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ____. These standard terms of service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. _Customers will be notified of material changes in these standard terms of service resulting from changes in local, state or federal legislation or rules, applicable charges, or TDSP rates, ~~[*insert if option A below applies:* except for changes in the energy charge component of the price for basic service as described below,]~~ at least 45 days before such changes take effect unless otherwise directed by law. Each Standard Terms of Service ~~Agreement~~ will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the formula detailed below. ~~following [*insert if option A applies:* plus any applicable recurring monthly charges identified below.]~~ Non-recurring charges (i.e., charges not occurring every month) will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES,** below.

~~A.~~ Your rate for POLR service will be derived from the following formula: ~~consist of an energy charge, [*insert if applicable:* monthly customer charge], and non-bypassable charges as described below.~~

POLR rate (in cents/kWh) = (X% * Zonal Average Monthly MCPE Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand Charge) + (TDSP Charges)

Where the "Zonal Average Monthly MCPE shaped by ERCOT Load Profile" is a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:

$$\frac{\sum_{\text{All Intervals}} \left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of a Month of Interval Load}} * \text{Corresponding 15 Minute Zonal MCPE} \right)}{10}$$

~~Energy charge: The energy charge shall be recalculated at the beginning of each month in accordance with the formula provided below. If the recalculated energy charge varies by more than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall be the recalculated charge (see note below).* If the recalculated energy charge does not vary by more than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall remain unchanged. The applicable energy charge for the billing month will be stated on your monthly bill from POLR Provider. For~~

~~additional information on the current energy charge, refer to [*insert website address*] or contact POLR Provider at [*insert phone number*].~~

~~$\text{Energy Charge}_N = \text{Energy Charge}_E * \text{Gas Price}_N / \text{Gas Price}_E$~~

~~Where:~~

~~**Energy Charge$_N$ = recalculated energy charge**~~

~~**Energy Charge$_E$ = existing energy charge**~~

~~Gas Price$_N$ = the average of the closing one month forward New York Mercantile Exchange (NYMEX) Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five trading days of the month ended 30 days prior to the effective date of the recalculated energy charge.~~

~~Gas Price$_E$ = the average of the closing one month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five business days preceding the bid due date for the first gas price adjustment of the POLR term. For subsequent calculations, Gas Price$_E$ = the average of the closing one month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal*, at the time the existing energy charge was last adjusted.~~

~~*NOTE: If the recalculated energy charge results in the overall POLR price being lower than the price to beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*], the POLR price will be set at the price to beat rate for that billing month.~~

~~[*If applicable*] Monthly customer charge: [*Insert $ amount*]~~

~~**Nonbypassable charges:** These charges are billed to POLR Provider and include, but are not limited to: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition (CTC) charges, system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities, including POLR Provider's Gross Receipts tax, and other non-bypassable charges.~~

~~*OR [insert if applicable]*~~

~~B. [Insert rate = 125% of the applicable price to beat] This rate is 125% of the price to beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*]. You will be notified of any change in the rate that may result from changes in the price to beat rate.~~

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TOSS AT THE OPTION OF THE POLR PROVIDER:

POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, ~~secure your service~~ pursuant to subsection (a) CASH DEPOSIT below or to choose PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT pursuant to subsection (b) below.]

POLR Provider shall~~may~~ not require a cash deposit if you are able to provide ~~the~~ POLR Provider with a Credit Reference Letter that includes the following representations: 1) you have been a customer of any retail electric provider or the electric utility (prior to 2002) within the two years prior to your request for electric service; 2) you

are not delinquent in payment of any such electric service account; and 3) you were not late in paying a bill more than once during the last 12 consecutive months.

A residential customer shall also ~~may~~ be deemed as having established satisfactory credit and shall not be required to pay a cash deposit if the customer possesses a satisfactory credit rating obtained through an accredited credit reporting agency.

If these conditions do not apply, POLR Provider may require a cash deposit unless you can demonstrate to the POLR Provider any of the following prior to the due date of the cash deposit: 1) you are 65 years of age or older and your account with any retail electric provider or the electric utility (prior to 2002) has not had a delinquent balance within the last 12 months for the same type of service; 2) you are a victim of family violence as defined by the Texas Family Code § 71.004, by a family violence center, or by treating medical personnel;* or 3) you are medically indigent.**

*This determination shall be evidenced by submission of a certification letter developed by the Texas Council on Family Violence. The certification letter may be submitted directly by use of the toll-free fax number listed below to POLR Provider.

** To be considered medically indigent, the customer must make a demonstration that the following criteria are met: the customer's household income must be at or below 150% of the poverty guidelines as certified by a governmental entity or government funded energy assistance program provider, and either of the following must apply: (i) the customer or the customer's spouse has been certified by that person's physician (for the purposes of this subsection, the term "physician" shall mean any medical doctor, doctor of osteopathy, nurse practitioner, registered nurse, state-licensed social worker, state-licensed physical and occupational therapist, and an employee of an agency certified to provide home health services pursuant to 42 U.S.C. §1395 *et seq* as being unable to perform three or more activities of daily living, as defined in Title 22, Texas Administrative Code, Section 218.2, or (ii) the customer's monthly out-of-pocket medical expenses exceed 20% of the household's gross income.

a) TRADITIONAL CASH DEPOSIT

1) Your initial cash deposit, if required, will be based on one-sixth (1/6) of your estimated annual billing. You may also be required, in the future, to pay an initial or additional cash deposit if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and your billings are more than twice the amount estimated to determine your initial cash deposit. Instead of an additional cash deposit, you may pay the total amount due by the due date of the bill, provided you have not exercised this option in the previous 12 months.
2) Your total cash deposit shall not exceed an amount equivalent to one-sixth (1/6) of your estimated annual billing.
3) POLR Provider may require payment of an initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
4) A customer who has applied for or is enrolled currently in LITE UP Texas (Low Income Telephone and Electric Utilities Program) may pay the initial cash deposit to POLR Provider in two -installments. The first installment shall not exceed the estimated billing for the next month or one-twelfth (1/12) of the estimated annual billing and shall be due within ten days of POLR Provider's issuance of the written notice requiring the cash deposit. The second installment for the remainder of the cash deposit shall be due within 40 days of the issuance of the original written notice. For more information regarding LITE UP Texas, contact POLR Provider or call toll-free 1-866-4-LITE-UP (1-866-454-8387) to determine eligibility or to receive an application.
5) A written letter of guarantee may be used in lieu of paying a cash deposit. The guarantor must become or remain a customer of the POLR or its affiliated REP for the term in which the guarantee is in effect. If the guarantor fails to become, or ceases to be, a customer of the POLR or its affiliated REP, the POLR may require the customer to pay the initial or additional cash deposit as a condition of continuing the contract for service.
6) Upon default by a residential customer, the guarantor of the customer's account shall be responsible for the unpaid balance of the account only up to the agreed amount in the letter of guarantee. The

POLR, or its affiliated REP shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed. The guarantor will have 16 days from the date the notice is issued to pay the amount owed on the defaulted account. If the 16th day falls on a holiday or weekend, the due date shall be the next business day. The POLR or its affiliated REP may transfer the amount owed on the defaulted account to the guarantor's own electric service bill provided the guaranteed amount owed is identified separately on the bill.

7) The POLR or its affiliated REP may initiate disconnection of service to the guarantor for nonpayment of the guaranteed amount within ten days of issuance of a notice of disconnection.
8) Your service may be disconnected for failure to pay a required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.
9) A disconnection notice may be issued concurrently with either the written request for the initial or additional cash deposit or current monthly bill for electric service. Disconnection means a physical interruption of electric service.
10) You will accrue interest on your cash deposit(s) with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
11) Your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
12) Your cash deposit and accrued interest will be refunded if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments.
13) The guarantee agreement will be terminated if you pay your bills for 12 consecutive months without your service being disconnected for nonpayment and without having more than two delinquent payments within the last 12 months.

b) [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]* **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If you select the pay-in-advance option, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills, except the initial one requesting your payment in advance, will include, where applicable, the monthly charge, energy charge, non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include charges for two months average kilowatt hour (kWh)~~kWh~~ consumption during the prior year and will include, where applicable, ~~an estimate for two months of non-bypassable charges,~~ applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities. The pay-in-advance amount will be used in lieu of the cash deposit and will be no greater than $200 or less than $75. The initial pay-in-advance option in lieu of cash deposit will be due within ten days of issuance of a notice requiring a pay-in-advance billing.
3) Pay-in-advance billing requires that you maintain a balance of the two months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to the highest amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants such as square footage, and HVAC type and size. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it, if necessary.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.

9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.
10) A disconnection notice may be issued concurrently with the written request for the required pay-in-advance bill.

c) **BILLING**

1) You will be billed monthly for your electric service.
2) Your monthly billing period will be approximately 30 days.
3) You will be billed monthly after your scheduled monthly meter read date. Billing statements will reflect the total charges for POLR services provided by POLR Provider.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th day after issuance of the bill.
5) POLR Provider offers deferred and level payment (also known as budget) plans. Budget plans will be reconciled quarterly. Please contact POLR Provider at the 24-hour customer service number below for information about these options.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC SERVICE** in section 1:

Service Charges and Fees	**Amount**
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period. If you are a low-income customer, the first two premise usage histories provided on your behalf to an agency providing bill payment assistance shall not be counted in determining whether you are subject to an account history charge.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment (in addition to any applicable disconnect or reconnect charges).	No charge
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Unmetered Guardlight/Security lighting charge applies to existing guardlights.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB]
Late fees will be assessed on delinquent deferred payment arrangements. Deferred payment arrangements are delinquent if not paid by the date specified by the deferred payment plan.	5% assessed on the late deferred payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge

Service Charges and Fees	Amount
	from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread charge will be assessed if requested by the customer.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds.	$25.00
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customer that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees, and other costs associated with collection of delinquent amounts.	
POLR Provider reserves the right to charge for services requested by you that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten days after notice is issued.

b) Your service may be disconnected after you are notified of your failure to comply with the terms of this Standard Terms of Service ~~Agreement~~ or any payment plan.

~~14)~~c) Service may not be reconnected by the POLR Provider until all delinquent amounts and charges owed to POLR Provider have been paid.

d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT substantive rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.

e) If you choose to cancel service under this Standard Terms of Service ~~Agreement~~, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service.

f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.
g) A disconnection notice may be issued concurrently with your bill.
h) You may be disconnected for failure to pay an initial pay-in-advance bill in lieu of cash deposit or a monthly pay-in-advance bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide your social security number, a valid driver's license number, or other verifiable means of personal identification.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide POLR Provider information including, but not limited to: previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), driver's license, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.
No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter a level payment plan or deferred payment plan. If you decide to be placed on POLR Provider's:

a) Level (also known as Budget) Payment Plan, your term of service shall be six months from the date of the first monthly billing subsequent to being placed on the level payment plan. The term shall start on the date you enter the Level Payment Plan; or
b) Deferred Payment Plan, your term of service shall be a minimum of three months or the length agreed to for making deferred payments, whichever is longer. The term shall start on the date you enter the Deferred Payment Plan.
c) You will not be charged a penalty for canceling your service before the end of the term but you will be responsible for all outstanding amounts due including Level and Deferred Payment Plan reconciliation amounts.

7. END OF POLR TERM

POLR Provider's standard terms of service and obligations to offer the POLR rate specified under subsection 2, PRICE FOR BASIC SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

24-Hour Customer Service: (toll free)
24-Hour Power Outages: Contact your local electricity delivery company

Internet web-site:
Fax: (toll free)

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date, your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission of Texas, 1-888-782-8477 (toll free).

9. LOW INCOME PAYMENT ASSISTANCE INFORMATION

Rate discounts are available for qualified low-income customers. For more information, contact POLR Provider Customer Service or either of the following state agencies:

Texas Department of Housing and Consumer Affairs:	1-512-475-3800
Public Utility Commission of Texas:	1-888-782-8477 (toll free)

10. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, debit or credit card, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, money order or debit/credit card. If you pay by debit/credit card and it has been declined two or more times within the last 12 months, POLR Provider will require all further payments to be by cash, cashier's check or money order.

11. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

12. LIMITATION OF LIABILITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

13. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

14. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service ~~Agreement~~) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free 24-hour Customer Service number contained in this Standard Terms of Service ~~Agreement~~ or by contacting us via fax or e-mail. ***Cancellation of this agreement will result in disconnection of your service as provided in this agreement.***

Figure: 16 TAC §25.43(f)(1)(B)

Standard Terms of Service ~~Agreement~~

[*Insert POLR Provider Name*] (Certificate No._____)

Provider of Last Resort (POLR) Small Non-Residential Service (insert: less than 50 kW or greater than or equal to 50 kW)

This Standard Terms of Service (STOS)~~Agreement (TOSA)~~ applies to small non-residential customers (i.e., one megawatt and below) (insert: less than 50 kW or greater than or equal to 50 kW) receiving Provider of Last Resort (POLR) service from POLR Provider under Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These standard terms of service are subject to current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of material changes in these Standard Terms of Service resulting from changes in local, state, or federal legislation or rules, applicable charges, or TDSP rates, ~~[*insert if option A below applies:* except for changes in the energy charge component of the price for basic firm service as described below,~~ at least 45 days before such changes take effect, unless otherwise directed by law. Each TOSA will be given a unique version number for quick reference.

SPANISH LANGUAGE (IDIOMA ESPANOL) Si usted quiere obtener el mismo documento impreso detallando los Términos de Servicio en español comunicandose con nosotros al [*insert toll-free number*].

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. The rate for your electric service from POLR Provider will be based on the formula detailed below. ~~following [*INSERT IF OPTION A APPLIES TO POLR PROVIDER:* plus any applicable recurring monthly charges.] [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:*~~ These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING**.] Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

~~A.~~ Your rate for POLR service will be derived from the following formula:

POLR rate (in cents/kWh) = (X% * Zonal 30-Day Average MCPE Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand Charge) + (TDSP Charges)

Where the "Zonal 30-Day Average MCPE Shaped by ERCOT Load Profile" is a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:

$$\frac{\sum_{\text{All Intervals}} \left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of 30 days of Interval Load}} * \text{Corresponding 15 Minute Zonal MCPE} \right)}{10}$$

~~consist of an energy charge, [*INSERT IF APPLICABLE:* demand charge], [*INSERT IF APPLICABLE:* monthly customer charge], and non-bypassable charges as described below.~~

~~Energy charge: The energy charge shall be recalculated at the beginning of each month in accordance with the formula provided below. If the recalculated energy charge varies by more~~

than 5% from the existing energy charge, then the energy charge component of your rate for that billing month shall be the recalculated charge (see note below).* If the recalculated energy charge does not vary by more than 5% from the existing energy charge, then the energy charge component of your rate shall remain unchanged. The applicable energy charge will be stated on your monthly bill from POLR Provider. For additional information on the current energy charge, refer to [*INSERT POLR PROVIDER WEBSITE ADDRESS*] or contact POLR Provider at [*INSERT PHONE NUMBER*].

$$\text{Energy Charge}_N = \text{Energy Charge}_E * \text{Gas Price}_N / \text{Gas Price}_E$$

Where:

Energy Charge_N = recalculated energy charge

Energy Charge_E = existing energy charge

Gas Price_N = the average of the closing one month forward New York Mercantile Exchange (NYMEX) Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five trading days of the month ended 30 days prior to the effective date of the recalculated energy charge.

Gas Price_E = the average of the closing one month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal* for the last five business days preceding the bid due date for the first gas price adjustment of the POLR term. For subsequent calculations, Gas Price_E = the average of the closing one month forward NYMEX Henry Hub natural gas prices as reported in the *Wall Street Journal*, at the time the existing energy charge was last adjusted.

[*IF APPLICABLE*] Demand charge: [*Insert $/kW amount*]
The demand charge is calculated based on the customer's highest billing demand in any interval within the current billing period. Non-demand metered customers will be billed based on ten kilowatts (kW) monthly.

[*IF APPLICABLE*] Monthly customer charge: **[*Insert $ amount*]**

Nonbypassable charges: These charges are billed to POLR Provider and include, but are not limited to: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition (CTC) charges, system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities, including POLR Provider's Gross Receipts tax, and other non-bypassable charges.

*NOTE: If the recalculated energy charge results in the overall POLR price being lower than the price to beat rate charged by [*specify affiliated REP*] under [*specify applicable tariff*], the POLR price will be set at the price to beat rate for the applicable billing month.

OR [INSERT IF APPLICABLE]

B. [Rate = 125% of the applicable PTB] This rate is 125% of the price to beat rate charged by [*SPECIFY AFFILIATED REP*] under [*SPECIFY APPLICABLE TARIFF*]. You will be notified of any change in the rate that may result from changes in the price to beat rate.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after

POLR provider has begun providing your electric service, ~~secure your service~~ pursuant to subsection (a) CASH DEPOSIT or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b).]

POLR Provider has no obligation to continue to serve you if you fail to pay the required cash deposit within the appropriate time frame [or to accept pay-in-advance billing.]

a) CASH DEPOSIT

If service is initiated under option (a) CASH DEPOSIT you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16^{th}) day after issuance of the bill. Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider by paying a cash deposit, you will be required to pay the initial cash deposit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a two-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your two highest months of usage and demand in the most recent 12-month period. If 12 months of data are not available, the required two months cash deposit shall be determined by the longest available period less than 12 months.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC size and type, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may be required, in the future, to pay an initial or additional cash deposit or [to pay-in-advance pursuant to subsection (b)] if you have been issued a disconnection notice within the last 12 months or if you have been a customer for 12 months and you have used more than twice the amount estimated to determine your initial cash deposit.
4) You will accrue interest on your cash deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with an irrevocable letter of credit in the amount of the required cash deposit. The required security must be provided within ten days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the final bill for service may be calculated using the out of cycle meter readings. Final bills will not be prorated.
8) POLR Provider will require payment of the initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.

b) [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER*] PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT

~~11~~1) If your POLR electric service is initiated by pay–in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills including the initial one requesting your payment in advance, will include the monthly customer charge, demand charge,

energy charge, and an estimate of two months' non-bypassable charges, applicable taxes, service charges and other costs as permitted by governmental or regulatory authorities.

~~12)~~2) Your initial pay-in-advance billing will include charges for two months, based on historical demand (the highest demand recorded for your service in the prior 12 months) ~~plus an energy charge (based on your kWh consumption for the highest two months during the prior 12 months)~~ and will be due within ten days of issuance of the notice requiring a pay-in-advance billing.

~~13)~~3) Pay-in-advance billing requires that you maintain a balance of the two-months initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.

~~14)~~4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.

~~15)~~5) If your pay-in-advance billing exceeds the initial pay-in-advance amount then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.

~~16)~~6) There is no interest accrued on pay-in-advance billing.

~~17)~~7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of six months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If your monthly bill exceeds the pay-in-advance amount, the pay-in-advance amount will be adjusted accordingly.

~~18)~~8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.

~~19)~~9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the **PRICE FOR BASIC FIRM SERVICE** in section 1. These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each Premise.

Service Charges and Fees	**Amount**
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$10.00
Account History charge if you request and are provided a premise usage history for more than the most recent 12 months or if a 12 month history is requested for more than once within a 12 month period.	$25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts.	$15.00
Drawing on an irrevocable letter of credit. Includes all of the activities required to present a drawing letter to customer's bank.	$50.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00/ESI ID

Service Charges and Fees	Amount
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A two hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the Field Service Call as well as any TDSP discretionary charges.	$100.00/hour
Reconnection charge for reconnection of service pursuant to TDSP's tariffs.	[Insert pass through charge from TDSP]
Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB]
Master Contracts • Set-up fee per new or transferred contract • Additional fee per each unit placed on a master contract, added to an existing contract or transferred	 $25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for small non-residential 50 kW and below facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master metered facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	 [Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units
Late fees will be assessed on the seventeenth (17th) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed late fees if not paid by the date pursuant to a negotiated payment plan. ***Late fees may not be assessed against a customer with a peak demand of less than 50 kW.***	5% assessed on the late payment amount
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading:	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Processing fee for renegotiation of a payment plan. This fee applies if you request renegotiations more than once in any 30-day period. In addition, you may be required to pay the appropriate amount to the Company to reconcile your account balance.	$10.00
Return check charge for each check returned for insufficient funds. This charge will be imposed	$25.00

Service Charges and Fees	Amount
for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at Customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed to you.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for incurred court costs, legal fees and miscellaneous costs associated with legal action as a result of maintaining customer accounts.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if your monthly bill or pay-in-advance bill is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected 10 days after notice is issued.
b) Your service may be disconnected after you are notified of your failure to comply with the terms of this TOSA or any payment plan.
c) Service may not be reconnected until all delinquent amounts and charges owned to POLR Provider have been paid.
d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.
e) If you choose to cancel service under this TOSA, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch of provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC FIRM SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service or the date you switch electric service to another REP, whichever is later.
f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.
g) A disconnection notice may be issued concurrently with your pay-in-advance billing or cash deposit billing.
h) Your service may be disconnected for failure to pay an initial pay-in-advance bill, or monthly pay-in-advance bill, or cash deposit bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide a Federal tax identification (I.D) number, a social security number, a valid driver's license number or other verifiable means of personal identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including, but not limited to: previous billings and usage of electricity, meter

readings and types of service received, credit history, any records of tampering, and other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

No term of service is required under this agreement unless by mutual agreement a term is agreed to in writing between you and POLR Provider or unless you enter an agreed payment plan requiring a minimum term.

7. (insert and renumber if greater than or equal to 50 kW customer class: WAIVER OF CERTAIN CUSTOMER PROTECTION RULES)

For the small non-residential greater than or equal to 50 kW customer class, the following Customer Protection Rule provisions contained within Subchapter R of this chapter shall be deemed waived by the execution of this Standard Terms of Service:

(insert list of potentially waived customer protection rules).

8.~~7.~~ END OF POLR TERM

POLR Provider's standard terms of service and obligations to offer the POLR rate specified under subsection 2, PRICE FOR BASIC FIRM SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

9~~8~~. CONTACT INFORMATION

Name of Provider:	Certificate Number:
Physical Address:	Customer Assistance:
	Contact hours
	24-Hour Power Outage:
	Fax:
	Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days. Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free).

10~~9~~. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, [*Insert if offered by POLR Provider (optional):* in cash through an agent authorized by the POLR Provider], or automatic draft from your financial institution. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider's Customer Service number to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within (16 calendar days of bill issuance. If payments are not received by POLR Provider by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance. Late fees may not be assessed against a customer with a peak demand of less than 50 kW.

If you have had two or more personal checks returned for insufficient funds within the last 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check, or money order.

11.~~10.~~ FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

12.~~11.~~ LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

13.~~12.~~ REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBSTANTIVE RULE 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

14.~~13.~~ DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service ~~Agreement~~) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Standard Terms of Service Agreement. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply***

Figure: 16 TAC §25.43(f)(1)(C)

Standard Terms of Service ~~Agreement~~

[*Insert POLR Provider Name*] (Certificate No.____)
Provider of Last Resort (POLR) Large Non-Residential Service (> one megawatt)

This Standard Terms of Service (STOS)~~Agreement (TOSA)~~ applies to Large Non-Residential customers receiving Provider of Last Resort (POLR) service from pursuant to Public Utility Commission of Texas (PUCT) Retail Electric Provider (REP) Certificate No. ___. These standard terms of service are subject to certain current and future customer protection laws or rules as prescribed by local, state or federal authorities and to changes in applicable charges or transmission and distribution service provider (TDSP) rates. Customers will be notified of changes in applicable charges or TDSP rates, except for changes in the price for basic firm service as described below, at least 45~~30~~ days before such changes take effect, unless otherwise directed by law. Each TOSA will be given a unique version number for quick reference.

1. PRICE FOR BASIC FIRM SERVICE.

POLR Provider will provide basic firm service, defined as electric service not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. ~~[*INSERT EITHER OPTION A OR OPTION B BELOW*]~~

~~*OPTION A.*~~ The price for your electric service from POLR Provider will **be derived from the following formula:**

POLR rate (in cents/kWh) = (X% * MCPE Shaped by ERCOT Load Profile for Time Customer was Served Shaped by ERCOT Load Profile * Customer's Metered Usage) + (Monthly Customer Charge or Demand Charge) + (TDSP Charges)

Where the "MCPE Shaped by ERCOT Load Profile for Time Customer was Served Shaped by ERCOT Load Profile" is a weighted average defined per Weather Zone and Congestion Zone, and is reported on the ERCOT website, as:

$$\sum_{\text{All Intervals}} \left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of Interval Load for Time Customer is on POLR}} * \text{Corresponding 15 Minute Zonal MCPE} \right)$$

~~consist of an energy charge, [*INSERT IF APPLICABLE:* demand charge], [*INSERT IF APPLICABLE:* monthly customer charge], and non-bypassable charges as described below. [*PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER:* These charges may be applied in a pay-in-advance manner as described in section 2 **SECURITY AND BILLING.**]~~

~~**Energy charge** = [*INSERT EITHER:* "[*INSERT APPLICABLE FIGURE*] % of market clearing price of energy (MCPE) for each 15-minute settlement interval for customers in ERCOT" *OR* "[*INSERT APPLICABLE FIGURE*] % of market-based reference price as specified by the PUCT."]~~

~~[*INSERT IF APPLICABLE:* **Demand charge** = _____]~~

~~The demand charge is calculated based on the customer's highest billing demand in any interval within the current billing period.~~

~~[*INSERT IF APPLICABLE:* **Monthly customer charge =** _____]~~

~~*OPTION B.* Rate = 150% of the greater of $7.25 per megawatt-hour or the MCPE or the market-based price as specified by the PUCT and a monthly customer charge of $2897.00.~~

~~Non-bypassable charges billed to POLR Provider that will be added to the prices above include: Transmission and Distribution Service Provider's (TDSP) wires usage and miscellaneous discretionary charges, transition to competition charges (CTC), system benefit fund (SBF) payments, taxes or charges from various taxing or regulatory authorities including POLR Provider's Gross Receipts tax, and other non-by-passable charges.~~

Non-recurring charges will be billed as they are incurred and are set out in section 3 **SERVICE CHARGES AND FEES** below.

2. SECURITY AND BILLING

[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN STANDARD TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER] POLR Provider will offer the option to either pay a cash deposit to prevent disconnection after POLR provider has begun providing your electric service, ~~secure your service~~ pursuant to subsection (a) CASH DEPOSIT or to choose **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT** pursuant to subsection (b). You will either be required to pay a cash deposit or be subject to pay-in-advance billing.]

POLR Provider has no obligation to continue to serve you if you fail to pay the required cash deposit within the appropriate time frame [or to accept pay-in-advance billing.]

a) CASH DEPOSIT

If service is initiated under option (a) **CASH DEPOSIT** you will be billed monthly for your electric service after the scheduled monthly meter read date. The monthly billing period will be approximately 30 days. Your bill will be due upon receipt and will be considered delinquent if it is not paid by the sixteenth (16^{th}) day after issuance of the bill. The late payment fee (5%) will be **assessed on the seventeenth (17^{th}) day after the bill issuance for all unpaid balances.** Disconnection of service may result upon non-payment of a bill pursuant to section 4 **DISCONNECTION OF SERVICE.**

1) If your service is initiated with POLR Provider by paying a cash deposit, you will be required to pay the initial cash deposit or letter of credit after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a customer of POLR Provider. Cash deposits required for POLR service shall be equivalent to the estimated billing for a three-month period, including, where applicable, customer and non-bypassable charges, and energy and demand charges determined based on your three highest months of usage and demand during the most recent 12-month period.
2) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your cash deposit amount. Estimates will be based on key energy determinants and electric equipment, including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Other non-discriminatory methods of determining creditworthiness may be used.
3) You may also be required, in the future, to pay an additional cash deposit if you have been issued a disconnection notice or if you have been a customer for three months and you have used more than the amount estimated to determine your initial cash deposit.

4) You will accrue interest on your deposit with POLR Provider. Each year in December, the PUCT establishes the interest rate the POLR Provider will apply to your cash deposit for the next calendar year.
5) You may satisfy security requirements by providing POLR Provider with a surety bond or an irrevocable letter of credit in the amount of the required cash deposit. The surety bond must be approved by the POLR provider. The required security must be provided within ten days after a notice is issued to you requesting a cash deposit.
6) If not previously returned to you, your cash deposit and accrued interest, less any outstanding balance owed for electric service, will be refunded to you upon closing of your account with POLR Provider.
7) If your service is terminated prior to the regularly scheduled meter read date, the energy usage for the final bills may be calculated using the out of cycle meter readings and will include all charges defined in section 1. Price for Basic Firm Service.
8) POLR Provider will require payment of the initial cash deposit within ten days of receiving confirmation from the Registration Agent of the effective date you become a customer of the POLR.
9) Your service may be disconnected if you fail to pay the required cash deposit (initial or additional) within ten days of issuance of a notice of disconnection of service.

b) ***[PAY-IN-ADVANCE LANGUAGE TO BE INCLUDED IN <u>STANDARD</u> TERMS OF SERVICE AT THE OPTION OF POLR PROVIDER]*** **PAY-IN-ADVANCE BILLING OPTION IN LIEU OF CASH DEPOSIT**

1) If your POLR electric service is initiated by pay-in-advance, you will be billed in advance for your electric service after POLR Provider receives confirmation from the Registration Agent of the effective date you are to become a POLR customer of POLR Provider. All bills will include the monthly customer charge, demand charge, energy charge, and an estimate of two months' non-bypassable charges, applicable fees, taxes, service charges and other costs as permitted by governmental or regulatory authorities.
2) Your initial pay-in-advance billing will include, where applicable, charges for two months, based on historical demand ~~(the highest demand recorded for your service in the prior 12 months) plus an energy charge (based on your kWh consumption for the highest two months during the prior year)~~ and will be due within ten days of issuance of the notice requiring a pay-in-advance billing
3) Pay-in-advance billing requires that you maintain a balance of the two-month initial total estimated charges for the time that you are a POLR customer and will be billed monthly on approximately 30-day periods.
4) Your bill will be due upon receipt and will be considered delinquent if it is not paid by the 16th calendar day after issuance of the bill.
5) If your pay-in-advance billing exceeds the initial pay-in-advance amount, then the pay-in-advance billing amount will be reset to that amount for the next billing cycle.
6) There is no interest accrued on pay-in-advance billing.
7) If historical usage is not available, POLR Provider in its sole judgment may develop reasonable good faith estimates to determine your billing and establish a pay-in-advance billing amount accordingly. Estimates will be based on key energy determinants and electric equipment including, but not limited to: square footage, HVAC type and size, type of business, hours of operation, standard industry load factor assumptions, etc. Once there is an established history of three months usage, POLR Provider will review the pay-in-advance amount and adjust it if necessary. If at any time the sum of your two highest monthly bills exceeds the pay-in-advance amount, the pay-in-advance amount may be adjusted accordingly.
8) Billing statements will reflect the total charges for POLR services provided by POLR Provider.
9) Your service may be disconnected if you fail to pay the required pay-in-advance bill within ten days of issuance of a notice of disconnection of service.

3. SERVICE CHARGES AND FEES

You will be subject to the following charges and fees in addition to the rates for service prescribed in section 1 **PRICE FOR BASIC FIRM SERVICE.** These fees will be billed for each premise. "Premise" herein shall mean the designated property or facilities and associated metered account identified by an Electric Service Identifier Number (ESI ID), which is a unique and permanent identifier assigned to each service point.

Service Charges and Fees	Charge or Fee
Account Reinstatement fee for handling accounts for reconnection after disconnection for non-payment. This is in addition to any applicable disconnect or reconnect charges.	$ 50.00
Account History charge if you request and are provided a service point usage history for more than the most recent 12 months or if a 12-month history is requested more than once within a 12-month period.	$ 25.00
Collection Letter charge for processing a registered or certified letter demanding payment of past due accounts or drawing on your letter of credit.	$15.00
Drawing on irrevocable letter of credit includes all of the activities required to present a drawing letter to your bank.	$150.00 plus any fees imposed by financial institution
Disconnection charge for disconnection of service pursuant to Transmission and Distribution Service Provider's (TDSP) tariffs, including charges that may be assessed by the TDSP for scheduling a disconnection that is canceled.	[Insert pass through charge from TDSP]
Equipment charge for providing testing, monitoring or other special equipment at the request of the customer.	[Insert pass through charge from TDSP]
Field Collection charge for each trip to a customer's premise to collect an amount that is past due when the customer requests the trip.	$10.00 / ESI ID
Field Service Calls for each trip to the customer's premise to provide non-competitive services such as billing and outage-related inquiries, as requested and approved by the customer after trip charges are disclosed. A four hour minimum will be billed for each customer requested Field Service Call and includes travel and incidental expenses with the field service call.	$200.00/hour
Late fees will be assessed on the seventeenth (17th) day after the bill issuance for all unpaid balances, including pay-in-advance billing. Payment arrangements are delinquent and will be assessed a late fee if not paid by the date pursuant to a negotiated payment plan.	5% assessed on the late payment amounts
Master Contracts ▪ Set-up fee per new or transferred contract ▪ Additional fee per each unit placed on a master contract, added to an existing contract or transferred	$25.00 $ 5.00
Master Metered Facilities: **Master Metered Tenant charge** for facilities may be assessed to recover costs associated with installing, maintaining, testing, reading or other costs incurred by POLR Provider for rendering electric service to tenants of master metered facilities. **Tenant Notification charge** for each apartment unit to recover expenses incurred each time a tenant in a master meter facility is notified of either impending disconnection for nonpayment of the electric service or of actual disconnection.	[Insert pass through charge from TDSP] $25.00 to meet Subst. R. 25.483 minimum. $10.00 per addn'l 5 notices per 50 units over 100 units

Service Charges and Fees	Charge or Fee
Out-of-cycle meter reading charge may be charged if you request an out-of-cycle meter reading.	
During regular hours	[Insert pass through charge from TDSP]
Outside regular working hours – Non-holiday	[Insert pass through charge from TDSP]
Outside regular working hours – Holidays	[Insert pass through charge from TDSP]
Reread request charge for each request by a customer to obtain meter readings in addition to the normal cycle readings.	[Insert pass through charge from TDSP]
Return check charge for each check returned for insufficient funds. This charge will be imposed for each returned check (or for any bill payment method that results in a notice of insufficient funds from the customer's financial institution.)	$ 25.00
Unmetered Guardlight/Security lighting charge applies to existing guardlights or security lighting.	[Insert applicable $/kWh charge equivalent to 125% of former applicable PTB tariff for unmetered guardlight/security lighting]
Tampering charge for unauthorized reconnection of service, tampering with the electric meter, theft of electric service by any person on customer's premise, or evidence thereof, at customer's premise. Additional charges for repair, replacement, relocation of equipment and estimated amount of electric service not recorded may also be billed.	[Insert pass through charge from TDSP]
Disconnection Reminder Notification charge for notifying customers that disconnection of service may be in progress. This notification may be made by telephone, electronically or by any other means of communication appropriate for the customer.	$5.00
POLR Provider reserves the right to charge for court costs, legal fees and other costs associated with collection of delinquent amounts and miscellaneous legal costs associated with maintaining the account.	
POLR Provider reserves the right to charge for services, requested by you, that are rendered on your behalf after your approval of disclosed charges for those services, as well as the right to pass through tariff charges for services rendered by the TDSP and billed to POLR Provider.	

4. DISCONNECTION OF SERVICE

Disconnection means a physical interruption of electric service. Disconnection is subject to the rules of the PUCT.

a) Your account will be considered delinquent if payment for your monthly bill or pay-in-advance billing is not paid on or before the 16th day after issuance of the bill. If your account becomes delinquent, your service may be disconnected ten days after notice is issued.

b) Your service may be disconnected for failure to pay cash deposit as well as pay in advance. Your service may be disconnected after you are notified of your failure to comply with the terms of this TOSA or any payment plan.
c) Service may not be reconnected until all delinquent amounts and charges owed to POLR Provider have been paid. Upon receipt of all amounts and charges owed service may not be reconnected immediately and is dependent upon TDSP scheduling.
d) Your service may be disconnected without notice if a dangerous or hazardous condition exists, if the service has been connected without proper authority or for the reasons prescribed in the PUCT Substantive Rules. Service will not be reconnected until the dangerous or hazardous condition has been corrected.
e) If you choose to cancel service under this TOSA, your service will be disconnected unless you have made arrangements with another retail electric provider and a switch to the new provider has been successfully completed by the Registration Agent by the date you choose to cancel service. You will be responsible for any charges pursuant to section 1 **PRICE FOR BASIC SERVICE,** section 2 **SECURITY AND BILLING** and section 3 **SERVICE CHARGES AND FEES** of this agreement up to the date you choose to cancel service or the date you switch electric service to another REP, whichever is later.
f) A disconnection notice may be issued concurrently with the written requests for either the initial or additional cash deposit or with a pay-in-advance in lieu of cash deposit billing.
g) A disconnection notice may be issued concurrently with your pay-in-advance or cash deposit billing.
h) Your service may be disconnected for failure to pay an initial pay-in-advance bill or monthly pay-in-advance bill.
i) POLR Provider cannot disconnect your electric service until you are a customer of the POLR Provider.

5. CUSTOMER INFORMATION

You will be required to provide a legal name, Federal tax identification (I.D.) number, a social security number, a valid driver's license number or other verifiable means of identification in order to allow verification of changes you request in services from POLR Provider.

You authorize the TDSP, any previous retail electric provider, or the Independent Organization to provide information to POLR Provider including but not limited to previous billings and usage of electricity, meter readings and types of service received, credit history, any records of tampering, other names in which service has been provided, social security number, contact telephone number(s), tax ID or driver's license number, etc.

You authorize POLR Provider at POLR Providers discretion to release your customer payment information to credit reporting agencies, regulatory agents, agents of POLR Provider, energy assistance agencies, law enforcement agencies or the TDSP.

You authorize POLR Provider to use credit-reporting agencies to evaluate your credit history.

6. LENGTH OF AGREEMENT

NOTICE: POLR PROVIDER CANNOT REQUIRE THAT YOU SIGN UP FOR A MINIMUM CONTRACT TERM AS A CONDITION OF PROVIDING SERVICE.

Subject to the advance payment provisions described in section 2, no term of service is required under this TOSA unless by mutual agreement a term is agreed to in writing between you and POLR Provider or if you enter an agreed payment plan requiring a minimum term.

7. END OF POLR TERM

POLR Provider's standard terms of service and obligations to offer the POLR rate specified under section 1, PRICE FOR BASIC FIRM SERVICE, will expire on [*insert last date of POLR term*]. At least 60 days before that date, POLR Provider will provide you notice of available options for securing electric service after POLR's existing term

has expired. If you obtain electric service from a provider other than POLR Provider, your final bill from POLR Provider will be offset against your deposit and any remaining balance will be refunded to you within 20 days from the final meter read date.

8. CONTACT INFORMATION

Name of Provider:
Physical Address:

Certificate Number:
Customer Assistance:
Contact hours:
24-Hour Power Outage:
Fax:
Internet web-site:

You may contact POLR Provider if you have a dispute concerning your bill or your service from POLR Provider. You must provide, in writing, within ten business days of the invoice date your reasons for disputing the invoice. You will be obligated to pay the undisputed portion of the bill and the POLR may pursue disconnection of service for nonpayment of the undisputed portion after appropriate notice. In the event that you give timely notice of a dispute, you and the POLR Provider shall, for a period of 30 calendar days following the POLR Provider's receipt of the notice, pursue diligent, good faith efforts to resolve the dispute. Following resolution of the dispute, any amount found payable by either party shall be paid within ten business days.

Complaints regarding your service may also be directed to the Public Utility Commission, 1-888-782-8477 (toll free). Complaints directed to the Public Utility Commission do not relieve customer's obligation to pay in full within 16 days .

9. BILL PAYMENT METHODS

You may pay for your electric service by personal or cashier's check, money order, electronic funds transfer, automatic draft from your financial institution or in cash through a company authorized agent. If you choose to make payment via electronic funds transfer or automatic draft, you must contact POLR Provider' Customer Service number above to begin those options for bill payment at no cost. Regardless of the payment method you select, all payments must be made within 16 calendar days of bill issuance. If POLR Provider does not receive payments by the end of the day on the due date, the bill will be considered delinquent and a late fee of 5% will be applied to all unpaid balances including pay-in-advance.

If you have had two or more personal checks returned for insufficient funds within the past 12 months, POLR Provider will require all further payments for electric service to be by cash, cashier's check or money order.

10. FORCE MAJEURE

POLR Provider shall not be liable in damages for any act or event that is beyond its control including but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, terrorism, wildlife, accident, breakdown or accident to machinery or equipment, or a valid curtailment order, regulation, or restriction imposed by governmental, military, or lawfully established civilian authorities, including any directive of the independent organization, and performance or nonperformance by the TDSP.

11. LIMITATION OF LIABILITY AND INDEMNITY

POLR PROVIDER DOES NOT GENERATE YOUR ELECTRICITY, NOR DOES POLR PROVIDER TRANSMIT OR DISTRIBUTE ELECTRICITY TO YOU. POLR PROVIDER WILL NOT BE LIABLE FOR CONSEQUENTIAL, FLUCTUATIONS, INTERRUPTIONS OR IRREGULARITIES IN BASIC FIRM SERVICE. LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR OTHERWISE SHALL BE LIMITED

TO DIRECT, ACTUAL DAMAGES. NEITHER YOU NOR THE POLR PROVIDER SHALL BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE.

12. REPRESENTATIONS AND WARRANTIES

POLR PROVIDER WARRANTS THAT THE ELECTRICITY SOLD UNDER THIS AGREEMENT WILL BE "BASIC FIRM SERVICE" AS THAT TERM IS DEFINED IN PUCT SUBST.R. 25.43(c)(3), TO WIT "ELECTRIC SERVICE NOT SUBJECT TO INTERRUPTION FOR ECONOMIC REASONS AND THAT DOES NOT INCLUDE VALUE ADDED OPTIONS OFFERED IN THE COMPETITIVE MARKET. BASIC FIRM SERVICE EXCLUDES, AMONG OTHER COMPETITIVELY OFFERED OPTIONS, EMERGENCY OR BACK-UP SERVICE, AND STAND-BY SERVICE."

POLR PROVIDER MAKES NO OTHER WARRANTIES WHATSOEVER WITH REGARD TO THE PROVISION OF ELECTRIC SERVICE AND DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

13. DISCRIMINATION

POLR Provider will not refuse to provide electric service or otherwise discriminate in the provision of electric service to any customer based on race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, familial status, level of income, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.

You have the right to cancel this agreement (Standard Terms of Service ~~Agreement~~) for electric service without penalty or fee of any kind for a period of three federal business days after you have received the Standard Terms of Service. You may cancel your service and this agreement by calling the toll free Customer Service number during the hours stated in this Standard Terms of Service ~~Agreement~~. Service may also be cancelled by toll-free fax or e-mail. ***Canceling this service agreement will result in disconnection of service if you have not made arrangements for alternative supply.***

Figure: 16 TAC §25.43(k)(1)(A)

$$\frac{\sum_{\text{All Intervals}}\left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of a Month of Interval Load}} * \text{Corresponding 15 Minute Zonal MCPE}\right)}{10}$$

Figure: 16 TAC §25.43(k)(1)(B)

$$\frac{\sum_{\text{All Intervals}}\left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of 30 days of Interval Load}} * \text{Corresponding 15 Minute Zonal MCPE}\right)}{10}$$

Figure: 16 TAC §25.43(k)(1)(C)

$$\frac{\sum_{\text{All Intervals}}\left(\frac{\text{15 Minute Interval Load Based on Appropriate Customer Class Profile}}{\text{Sum of Interval Load for Time Customer is on POLR}} * \text{Corresponding 15 Minute Zonal MCPE}\right)}{10}$$

Figure: 16 TAC §25.505(i)(4)

Σ((RTEP - POC) * (number of minutes in a settlement interval / 60 minutes per hour)) for each settlement interval when RTEP - POC >0.

Figure: 25 TAC §229.162(74)(D)(i)

Table A. Control of spores: Product heat-treated to control vegetative cells and subsequently packaged.			
Critical a_w values	Critical pH values		
	4.6 or less	>4.6 – 5.6	>5.6
0.92 or less	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS
>0.92-0.95	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS
>0.95	non-PHF/non-TCS	PHF/TCS	PHF/TCS

Figure: 25 TAC §229.162(74)(D)(ii)

Table B. Control of vegetative cells and spores: Product not heat-treated or heat-treated but not packaged.				
Critical a_w Values	Critical pH values			
	<4.2	4.2 – 4.6	4.6 – 5.0	>5.0
<0.88	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS
0.88-0.90	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS
>0.90-0.92	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS	PHF/TCS
>0.92	non-PHF/non-TCS	PHF/TCS	PHF/TCS	PHF/TCS

Figure: 25 TAC §229.164(k)(1)(A)(ii)

Cooking Raw Animal Foods
Alternatives to the 155 Degree Fahrenheit/15 Second Requirement

Minimum Temperature °C (°F)	**Minimum Time**
63 (145)	3 minutes
66 (150)	1 minute
70 (158)	< 1 second (instantaneous)

Figure: 25 TAC §229.164(k)(1)(B)(i)

Cooking Whole Beef or Corned Beef Roasts
Oven Preheating/Holding Requirements Per Weight

Oven Type	Oven Temperature Based on Roast Weight	
	Less than 4.5 kg (10 lbs)	4.5 kg (10 lbs) or More
Still Dry	177° C (350° F) or more	121° C (250° F) or more
Convection	121° C (250° F) or more	121° C (250° F) or more
High Humidity [1]	121° C (250° F) or more	121° C (250° F) or more
[1] Relative humidity greater than 90% for at least 1 hour as measures in the cooking chamber or exit of the oven; or in a moisture-impermeable bag that provides 100% humidity.		

Figure: 25 TAC §229.164(k)(1)(B)(ii)

Cooking Whole Beef or Corned Beef Roasts
Heating Temperatures and Holding Times

Temperature °C (°F)	**Time[1] in Minutes**	Temperature °C (°F)	**Time[1] in** Seconds
54.4 (130)	112	63.9 (147)	134
55.0 (131)	89	65.0 (149)	85
56.1 (133)	56	66.1 (151)	54
57.2 (135)	36	67.2 (153)	34
57.8 (136)	28	68.3 (155)	22
58.9 (138)	18	69.4 (157)	14
60.0 (140)	12	70.0 (158)	0
61.1 (142)	8		
62.2 (144)	5		
62.8 (145)	4		
[1] Holding time may include postover heat rise.			

Figure: 25 TAC §229.165(a)(3)

Utensil Category	**Description**	**Maximum Lead mg/L**
Hot Beverage Mugs	Coffee Mugs	0.5
Large Hollowware	Bowls greater than or equal to 1.1 L (1.16 QT)	1
Small Hollowware	Bowls < 1.1 L (1.16 QT)	2.0
Flat Utensils	Plates, Saucers	3.0

Figure: 25 TAC §229.165(k)(14)(A)

Minimum Concentration	Minimum Temperature	
mg/L	pH 10 or less °C (°F)	pH 8 or less °C (°F)
25	49 (120)	49 (120)
50	38 (100)	24 (75)
100	13 (55)	13 (55)

Figure: 25 TAC §229.165(n)(1)(D)(ii)(I)

Temperature	Cleaning Frequency
5.0°C (41°F) or less	24 hours
>5.0°C - 7.2°C (>41°F - 45°F)	20 hours
>7.2°C - 10.0°C (>45°F - 50°F)	16 hours
>10.0°C - 12.8°C (>50°F - 55°F)	10 hours

Figure: 25 TAC §229.171(j)(6)

RETAIL FOOD ESTABLISHMENT INSPECTION REPORT

San Code	Date	Time In	Time Out	Establishment Number	Permit Number	Risk Category

Purpose of Inspection: 1-Compliance 2-Routine 3-Field Investigation 4-Visit 5-Other

Establishment:	Owner:	
Physical Address:	Zip:	Phone:

OUT 5 Pts	IN	NA	NO	COS	**Food Temperature/Time Requirements** Violations Require Immediate Corrective Action	Remarks
					1. Proper Cooling for Cooked/Prepared Food	
					2. Cold Hold (41°F/45°F)	
					3. Hot Hold (135°F)	
					4. Proper Cooking Temperatures	
					5. Rapid Reheating (165°F in 2 Hrs)	

Item/Location/Temperature

OUT 4 Pts	IN	NA	NO	COS	**Personnel/Handling/Source Requirements** Violations Require Immediate Corrective Action	Remarks
					6. Personnel with Infections Restricted/Excluded	
					7. Proper/Adequate Handwashing	
					8. Good Hygienic Practices (Eating/Drinking/Smoking/Other)	
					9. Approved Source/Labeling	
					10. Sound Condition	
					11. Proper Handling of Ready-To-Eat Foods	
					12. Cross-contamination of Raw/Cooked Foods/Other	
					13. Approved Systems (HACCP Plans/Time as Public Health Control)	
					14. Water Supply – Approved Sources/Sufficient Capacity/Hot and Cold Under Pressure	
OUT 3 Pts	IN	NA	NO	COS	**Facility and Equipment Requirements** Violations Require Immediate Correction, Not To Exceed 10 Days	Remarks
					15. Equipment Adequate to Maintain Product Temperature	
					16. Handwash Facilities Adequate and Accessible	
					17. Handwash Facilities with Soap and Towels	
					18. No Evidence of Insect Contamination	
					19. No Evidence of Rodents/Other Animals	
					20. Toxic Items Properly Labeled/Stored/Used	
					21. Manual/Mechanical Warewashing and Sanitizing at ( )ppm/temperature	
					22. Manager Demonstration of Knowledge/Certified Food Manager	
					23. Approved Sewage/Wastewater Disposal System, Proper Disposal	
					24. Thermometers Provided/Accurate/Properly Calibrated (±2°F)	
					25. Food Contact Surfaces of Equipment and Utensils Cleaned/Sanitized/Good Repair	
					26. Posting of Consumer Advisories (Heimlich/Disclosure/Reminder/Buffet Plate)	
					27. Food Establishment Permit	

Subtotal	**Other Violations** – Require Corrective Action, Not to Exceed 90 Days or the Next Inspection, Whichever Comes First
5pt	
4pt	
3pt	
Total	

F/U Yes/No	Inspected by: / Received by:	Print:	Print:	Title:

Form E-5 (9/05)

Corrective Actions to Ensure Safe Food

Item No.

1 Cooling

- PHF/TCS* food cooled from 135^{0}F to 70^{0}F more than 2 hours OR 135^{0}F to 41^{0}F (45°F) more than 6 hours; OR prepared food cooled to 41^{0}F (45°F) more than 4 hours:
  Action: Voluntary destruction, rapid reheating of cooked foods if less than 4 hours

2 Cold Hold

- PHF/TCS food held above 41^{0}F (45°F) more than 4 hours:
  Action: Voluntary destruction

- PHF/TCS food held above 41^{0}F (45^{0}F) less than 4 hours:
  Action: Rapid cool (e.g. ice bath)

3 Hot Hold

- PHF/TCS food held below 135^{0}F more than 4 hours:
  Action: Voluntary destruction

- PHF/TCS food held below 135^{0}F less than 4 hours:
  Action: Rapid reheat to 165^{0}F or more

4 Cooking

- PHF/TCS food undercooked:
  Action: Re-cook to proper temperature

5 Rapid Reheating

- Cold PHF/TCS food improperly reheated:
  Action: Reheat rapidly to 165^{0}F

7 Handwashing

- Food employees observed not washing hands:
  Action: Instruct employees to wash hands as specified in the Rules.

9, 10 Approved Source/Sound Condition

- Foods from unapproved sources/unsound condition:
  Action: Voluntary destruction

11 Proper Handling of Ready-to-Eat Foods

- Employee did not properly wash and sanitize hands before touching ready-to-eat food with bare hands:
  Action: Voluntary destruction

12 Cross Contamination of Raw/Cooked Foods

- Ready-To-Eat food contaminated by raw PHF/TCS food:
  Action: Voluntary destruction of ready to eat foods

14 Water Supply

- Facility does not have water for washing hands, preparing food, or cleaning equipment/utensils:
  Action: Voluntary suspension of food preparation

*Potentially Hazardous Food (PHF) / Time/Temperature Control for Safety (TCS)

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposals: Food and Fibers Research Grant Program

Statement of Purpose.

The Texas Department of Agriculture (TDA) is requesting proposals for projects for the Food and Fibers Research Grant Program (FFRGP) (formerly the Texas Food and Fibers Commission research program). The FFRGP is administered by TDA under the direction of the Food and Fibers Research Council (Council). The purpose of this program is to provide a vehicle for the Texas fibers and oilseeds industries to facilitate and support applied research in Texas by engaging in surveys, research, and investigations relating to the use of cotton fiber, cottonseed, oilseed products, other products of the cotton plant, wool, mohair, and other textile products. Funded projects are expected to yield applicable results within 1 - 6 years.

Submission Dates/Locations.

Forms required for submitting a proposal are available by accessing TDA's website at: www.agr.state.tx.us, or by e-mailing the FFRGP at: ffrgp@agr.state.tx.us. One hard copy and one electronic copy of the proposal in Microsoft Word format must arrive no later than 5:00 p.m. on **May 1, 2006,** to the following: Texas Department of Agriculture, Food and Fibers Research Grant Program, Attn: Karen Reichek, P. O. 12847, Austin, Texas 78711. The electronic copy shall be e-mailed to: ffrgp@agr.state.tx.us.

Eligibility.

Grant proposals will be accepted from any state-supported university, state agency, or federal agricultural agency located in the State of Texas.

Funding Areas.

All proposals must meet at least one topical area listed below:

1. Cotton research related to cotton production, quality, and processing;

2. Sheep and goat research related to wool and mohair production, quality, and processing;

3. Food protein and nutrition research related to cottonseed or peanut production, quality, processing, and consumption; and

4. Textile and natural fibers utilization research related to cotton, wool, and mohair textile production, quality, and utilization.

Proposal Requirements.

Funding Limitations:

It is anticipated that most projects will be funded in a range of $15,000 - $40,000 per year. Projects that exceed this range must have strong justification and a potential for providing significant, demonstrable benefits to Texas agriculture. Projects will be awarded for **one** year (September 1, 2006 - August 31, 2007). Projects may be re-submitted in subsequent years for continued funding.

TDA reserves the right to fund proposals partially or fully. Where more than one proposal on an eligible research topic is acceptable for funding, TDA may request cooperation between grantees or revision/adjustment to a proposal in order to avoid duplication and to realize the maximum benefit to the state.

Form Requirements:

Proposals must be submitted on forms FF-100, FF-101, and FF- 102 for consideration.

FF-100, Proposal Contact Information shall not exceed 2 pages.

FF-101, Proposal shall not exceed 3 pages.

FF-102, Proposal Budget shall not exceed 1 page.

The required forms are available by accessing TDA's website or by e-mailing the FFRGP at: ffrgp@agr.state.tx.us.

Technical Requirements:

Include the following items:

1. Cover Page - Do Not Exceed Two Pages. Include title, performing institution, principal investigator contact information, responsible contracts officer information, duration, amount requested, if this is a continuing project, cooperating investigators and their experience.

2. Research Proposal - Do Not Exceed Three Pages. Include the following:

A. Project Title;

B. Principal Investigator;

C. Background - Statement of the research problem and its general background;

D. Objectives - Concise outline of specific, feasible research objectives;

E. Research Plan - Strategies, procedures, and methodologies used in addressing the questions asked; and

F. Benefits - Description of the expected results and their anticipated contributions to agriculture in Texas.

3. Performance and Budget Information. Include the following:

A. Project Title;

B. Principal Investigator;

C. Published Reports - Estimated number of reports that will be published or presented during the funding period;

D. Expenditure Table - Include categories of Salary, Contracts, Travel, Materials and Operating Expenses, and Equipment. Round budget items to the nearest $100. Include a total project budget, as well as separate budgets for each institution (if a joint project with one or more universities). An example is available from the TDA website: www.agr.state.tx.us.

E. Supporting Funds Table - The FFRGP does not have a specific supporting funds requirement, but the ability of a project to claim supporting funds will be a positive factor in the review process. Supporting funds must be documented on the budget submission form and reported on a quarterly basis; and

F. Indirect Costs - The FFRGP will not pay for indirect costs, but indirect costs may be claimed as Supporting Funds. See "E." above.

Budget Information:

FFRGP projects are paid on a cost reimbursement basis.

1. Eligible Expenses. Generally, expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible. Expenses must be properly documented with sufficient backup detail, including copies of invoices. Examples of eligible expenditures are:

Personnel costs - both salary and benefits;

Travel - domestic (Reimbursement for foreign travel is discouraged);

Equipment - nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more; and

Supplies and direct operating expenses - equipment that costs less than $5,000 per unit, research and office supplies, postage, telecommunications, printing, etc.

2. Ineligible Expenses. The FFRGP does not allow funds to be used for indirect/overhead costs. Expenses that are prohibited by state or federal law are ineligible.

Examples of these expenditures are:

Alcoholic beverages;

Entertainment;

Contributions, charitable or political;

Expenses falling outside of the contract period;

Expenses for expenditures not listed in the project budget; and

Expenses that are not adequately documented.

3. Description of the Budget. Present an overall project budget, as well as a separate budget for each institution participating in a joint project. Include the following items in the budget description:

A. *Personnel services:* Grant funds may be used for directly supporting salaries and wages of investigators, co-investigators, graduate, and technical assistants. Support personnel can receive salaries and social/fringe benefits in proportion to the time devoted to the research project.

B. *Professional/Contractual:* Any contract or agreement entered into by a grantee that obligates grant funds must be in writing and consistent with Texas contract law. Grantees must maintain adequate documentation supporting budget items for a contractor's time, services, and rates of compensation.

C. *Travel:* Grant funds used for travel expenses, domestic or foreign, must be limited to the State of Texas established mileage, per diem, and lodging policies. Reimbursement for foreign travel is discouraged, but may be paid on a case-by-case basis. To be eligible for reimbursement, foreign travel shall be approved in advance by the Director of the FFRGP.

D. *Supplies and Direct Operating Expenses:* Expenses that are directly related to the grantee's day-to-day operation of the grant project that are not included in any of the Grantee's other standard budget categories and has an acquisition cost of less than $5,000 per unit. Grantees must allocate costs on a prorated basis for shared usage, including research and office supplies, postage, telecommunications, and printing. Items considered controlled by the State of Texas and have a value between $500 and $4999, will be considered property of TDA and will be subject to TDA inventory reporting requirements.

E. *Equipment:* Defined as tangible personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. Applicants must submit with their grant applications a list of all proposed equipment purchases for approval. Grantees are not authorized to purchase any equipment until they have received written approval to do so from the Director of the FFRGP through the original grant award or a subsequent grant adjustment notice. The FFRGP may refuse any request for equipment. Decisions regarding equipment purchases are made based on whether or not the grantee has demonstrated that the requested equipment is necessary, essential to the successful operation of the grant project, and reasonable in cost. Equipment purchased with FFRGP funds remains the property of TDA and is subject to TDA inventory reporting requirements.

F. *Supporting Funds:* The FFRGP is required by the Texas Legislature to report the supporting funds its projects receive. These supporting funds include other grants for the same or related projects, in-kind contributions of salary, materials, and/or equipment usage, and overhead attributable to the project. Quarterly reports of actual supporting funds and in-kind contributions will be required throughout the year detailing the source and amount.

Evaluation of Proposals.

One or more review panels may evaluate the proposals, including the Council.

The proposals will be evaluated on the following elements:

1. the scientific and technological merit of the proposal;

2. the potential of meeting the applied research requirement with expected application of useful results for agriculture within 1 - 6 years of the project's initiation;

3. the feasibility of the objectives;

4. the anticipated benefits to agriculture and the environment in Texas;

5. the requested budget in relation to the research plan; and

6. the ability to leverage additional funds.

Award Information and Notification.

The Council will approve projects for funding by the FFRGP. The FFRGP reserves the right to accept or reject any or all proposals submitted. TDA and the Council are under no legal or other obligation to execute a grant on the basis of a submitted RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP.

The public announcements and written notifications will be made to all applicants and their affiliated research institution. Favorable decisions will indicate the amount of award, duration of the grant, and any special conditions associated with the project.

General Compliance Information.

1. Prior to accepting the research grant and signing the contract agreement, researchers will be provided a copy of the TDA reporting requirements for their review. This document will explain billing procedures, quarterly and annual reporting requirements, procedures for requesting a change in the project scope or budget, and other miscellaneous items.

2. Any delegation by the Grantee to a subcontractor regarding any duties and responsibilities imposed by the grant award shall be approved in advance by TDA and shall not relieve the Grantee of its responsibilities to TDA for the performance thereof.

3. All grant awards are subject to the availability of appropriations and authorizations by the Texas Legislature, TDA and the Council.

4. Any information or documentation submitted to TDA as part of the project grant proposal is subject to disclosure under the Texas Public Information Act.

5. While FFRGP attempts to observe the strictest confidence in handling the research proposals, it cannot guarantee complete confidentiality on any matters that lie beyond its control. The confidentiality of recipient's "proprietary data" so designated shall be strictly observed to the extent permitted by appropriate Texas laws, including the Texas Public Information Act. There shall be no restriction on the publication of research results except when taking into consideration effects of prior publication on possible subsequent patent and license to use copyrighted material.

6. Universities shall control the ownership and disposition of all patentable products and inventories under an agreement with TDA. A copy of the intellectual property policy should be available to the FFRGP prior to September 1, 2006.

7. Grant recipients must submit information on their funded project to the Texas Agricultural Research Database.

8. Awarded grant projects must remain in full compliance with state and federal laws and regulations or be subject to termination at the discretion of TDA.

9. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the research project. Records shall be maintained for three years after the completion of the research project or as otherwise agreed upon with TDA. TDA and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the research project at any time throughout the duration of the agreement and for three years immediately thereafter. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA and the Texas State Auditor's Office reserve the right to inspect the research locations and to obtain from the research team full information regarding all project activities.

10. If the Grantee has a financial audit performed in any year during which the Grantee receives funds from Grantor; and if the Grantor requests information about the audit, the Grantee shall provide such information TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

11. In accordance with Texas Government Code Ann., §783.007, grant awards to Texas, institutions shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/U GMS012001.doc.

12. Grant management guidelines for FFRGP grants will be published under separate cover.

For any questions: Please contact Ms. Karen Reichek at (512) 936-2450 or by e-mail at: ffrgp@agr.state.tx.us .

TRD-200601290
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: March 1, 2006

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Office of the Attorney General

Notice of Contract Award

This publication is filed pursuant to Texas Government Code, Section 2254.030. The Request for Proposal was published in the December 16, 2005 issue of the *Texas Register* (30 TexReg 8461).

DESCRIPTION OF ACTIVITIES OF PRIVATE CONSULTANT:

The Office of the Attorney General of Texas (the "OAG") has entered into a major consulting services contract for the following services:

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. The OAG recoups its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services ("HHS"). Contractor will review the indirect cost methodologies of the OAG to determine areas of cost recovery which will maximize revenue from the recovery of indirect costs and will develop indirect cost rates throughout the OAG, as appropriate. Contractor will prepare Indirect Cost Allocation Plans for FY05 (based on actual expenditures) and for FY07 (based on budgeted expenditures) in accordance with OMB Circular A-87, for submission to HHS for federal approval and will negotiate approval of those plans with HHS. Contractor will also analyze existing legal billing rates of the OAG for purposes of reconciling those existing rates with actual costs of the OAG in providing the legal services and will provide to the OAG a report of that reconciliation. Contractor will develop the FY07 billing rates for legal services. Contractor will negotiate with HHS for approval of the FY07 billing rates. Finally, Contractor will provide guidance to the OAG in the implementation of these plans and billing rates.

NAME AND BUSINESS ADDRESS OF PRIVATE CONSULTANT:

The private consultant engaged by the OAG for these activities is Maximus, Inc., whose business address is 13601 Preston Road, Suite 201E, Dallas, TX 75240.

TOTAL VALUE AND TERM OF THE CONTRACT:

The total value of the contract is $49,000. The term of the contract began on February 21, 2006, and will terminate on August 31, 2006, unless federal approval is still pending for the plans. In such case, the contract will continue until August 31, 2007 for the sole purpose of obtaining the necessary federal approval.

DATES ON WHICH REPORTS ARE DUE:

The Indirect Cost Allocation Plans must be submitted to HHS no later than April 28, 2006. The final report regarding the FY07 billing rates for legal services must be submitted to the OAG no later than August 31, 2006.

For information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.

TRD-200601020
Stacey Schiff
Deputy Attorney General
Office of the Attorney General
Filed: February 24, 2006

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Capital Area Rural Transportation System

Request for Proposals

The Capital Area Rural Transportation System (CARTS) requests proposals from firms qualified to serve as the System Integrator to coordinate and oversee the deployment of the "swipe-card" portion of the CARTS Lone Star Card project, including, but not limited to the identification of an appropriate acquirer and an acquirer-approved Point of Sale (POS) terminal for CARTS buses.

Any contract entered into as a result of this RFP is subject to a financial assistance contract between CARTS and the Federal Transit Administration, and the successful proposer will satisfy all pertinent regulations and requirements pursuant to that agreement.

Requests for electronic copies of the RFP should be directed to Dave@RideCARTS.com with "Request for SI RFP" as the subject line of the e-mail request.

For print copies requests should be sent to: David Marsh, CARTS, P. O. Box 6050, Austin, TX 78762. No faxes or phone calls accepted.

A pre-proposal conference will be conducted at the CARTS headquarters in Austin on March 20, 2006 at 2:00 p.m. Proposal submittals are due by 3:00 p.m. on April 19, 2006.

TRD-200601001
Dave Marsh
General Manager
Capital Area Rural Transportation System
Filed: February 24, 2006

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of February 17, 2006, through February 23, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on March 1, 2006. The public comment period for these projects will close at 5:00 p.m. on March 31, 2006.

FEDERAL AGENCY ACTIONS:

Applicant: Flint Hills Resources; Location: The project is located at the south end of FM 1069 on the north side of the Corpus Christi Ship Channel (CCSC) between Naval Station Ingleside and Gulf Marine Fabricators and Baker Marine Corporation, Ingleside-on-the-Bay, on the San Patricio/Nueces County Line, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Ingleside, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 677265; Northing: 3078310. Project Description: The applicant requests authorization to amend an existing permit to allow the renovation of an existing dock terminal facility. The renovation includes the replacement of an existing dock, trestle, and pipe support structure (pipe rack) and demolition of the existing structures. The Department of the Army issued Permit No. 13763 on October 18, 1979, authorizing modifications to an existing, grandfathered dock facility and construction of several ship breasting dolphins. Amendment 13763(01) was issued January 28, 1993, authorizing the addition of a boom dock. In this request, the applicant proposes to construct a new trestle and pipe rack approximately 100 feet east of the existing structure. CCC Project No.: 06-0173-F1; Type of Application: U.S.A.C.E. permit application #13763(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Jefferson County Drainage District 6; Location: The project is located in various water bodies, including Green Pond Gully, Willow Slough, and Taylor Bayou, southwest of the City of Beaumont, in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle maps entitled: Star Lake, Alligator Hole Marsh, and Fannett West, Texas. Approximate center UTM Coordinates in NAD 27 (meters) at the Green Pond/Gilbert Woods Detention facility: Zone 15; Easting: 374000; Northing: 3312000. Approximate center UTM Coordinates in NAD 27 (meters) for the Needmore Diversion Channel: Zone 15; Easting: 374000; Northing: 3312000. Project Description: The applicant proposes to construct flood control improvements to Green Pond Gully and Taylor Bayou, including regional detention and levee construction, channel improvements, and the construction of a diversion channel from near the confluence of the North and South Forks of Taylor Bayou south to the Gulf Intracoastal Waterway (GIWW). The project will result in the direct impact to 692.41 acres of wetlands.

The Green Pond Detention Basin, levee construction, channel modifications, and Needmore Diversion Channel will be undertaken as part of flood reduction measures for the Taylor Bayou watershed. The Green Pond Detention Basin is a proposed 9,000-acre, aboveground detention facility located between Lawhorn Road, Farm-to-Market Road (FM) 365, South China Road, and Gallier Canal, with a maximum storage capacity of 15,000 acre-feet. The proposed Needmore Diversion Channel is a 63,000-foot-long, 14-foot-deep, 200-foot-wide-bottom channel within a 1,000-foot-wide right-of-way extending from near the confluence of the North and South Forks of Taylor Bayou to the GIWW. Rectification of several man-made channel restrictions are proposed along portions of the North Fork of Taylor Bayou at Craigen Road, State Highway (SH) 124, Interstate Highway (IH) 10, between Crystal Lakes, and between IH 10 and Green Pond Gully to restore and improve the flood flow characteristics of the waterway.

The applicant proposes to discharge fill into a total of 692.41 acres of jurisdictional wetlands for construction of the Green Pond Detention Basin, Needmore Diversion, and channel modifications at the above locations. Information regarding the proposed impacts and the applicant's assessment of the quality of these areas and the proposed mitigative ratios are available from the Texas General Land Office upon request. To offset impacts for the project, the applicant proposes to set aside 529 acres of wetlands adjacent to Spindletop Bayou within a 640-acre tract to be used for preservation. The remainder of the 640-acre tract is also entirely wetlands and was previously authorized to be used as partial compensation for impacts associated with the Mayhaw Diversion Channel project under Department of the Army Permit 22644. The 529 acres of the Spindletop Bayou site and an additional 1900+ acres within the Green Pond facility are proposed to be placed under a restrictive covenant. The composition of the 1900+ acres within the Green Pond detention facility includes a mix of forested wetlands and uplands. The applicant also proposes to create a total of 44 acres of wetlands and riparian forest within or adjacent to the Needmore Diversion with the construction of 40 acres of wetland shelf within the channel and 4 acres of riparian wooded corridor along the east border of the channel from Taylor Bayou south to Willow Slough. This will result in the preservation of 2,498.62 acres of land, including wetlands, for mitigation to compensate for impacts to 692.41 acres of waters. CCC Project No.: 06-0176-F1; Type of Application:

U.S.A.C.E. permit application #22643 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act.

Applicant: Erskine Energy, LLC; Location: The project is located within Galveston Bay, in State Tract (ST) 5-8A, in Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Umbrella Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 239167; Northing: 3285286. Project Description: The applicant proposes amend Permit No. 23871(01) to add the discharge of approximately 3,000 cubic yards of shell, gravel, or crushed rock to construct a 450-foot-long by 90-foot-wide by at most a 2-foot-deep pad to position a marine barge. Total acreage of proposed fill will be 0.92 acre. CCC Project No.: 06-0179-F1; Type of Application: U.S.A.C.E. permit application #23871(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Erskine Energy, LLC; Location: The project site is located within Galveston Bay, in State Tract (ST) 6-7A, approximately 12 miles easterly of Baytown, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Umbrella Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 326948; Northing: 3286059. Project Description: The applicant proposes to amend Permit No. 23872(01) to add the discharge of approximately 1,667 cubic yards of shell, gravel, or crushed rock to construct a 250-foot-long by 90-foot-wide by at most a 2-foot-deep pad to position a marine barge. Total acreage of proposed fill will be 0.51 acre. CCC Project +No.: 06-0180-F1; Type of Application: U.S.A.C.E. permit application #23872(02) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: Michael Johnson; Location: The project is located adjacent to the so-called Port Isabel Side Channel (PISC), at Tract D, approximately 0.3 miles south of the intersection of Port Road and State Highway 100 in the City of Port Isabel, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Isabel, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 678700; Northing: 2884218. Project Description: The applicant proposes to develop an 18.76-acre property to provide 50 waterfront home sites with adjacent small boat docking and access to the Gulf Intracoastal Waterway by opening an existing channel presently separated from the PISC by a 75-foot-wide earthen berm.

Historically, the channel within the property was dug with the intention of connecting it with the PISC and using it for commercial and/or industrial purposes. The site was never developed, and the channel was never connected. The existing channel is filled with hyper-saline water, is approximately 100 feet wide from water's edge to water's edge, and is surrounded by a band of wetlands that are approximately 5 feet wide. The depth of the existing channel at its center is approximately -9.0 feet mean high tide (MHT). The applicant's agent delineated a total of 1.004 acres of estuarine inter-tidal scrub-shrub wetlands on the property and a U. S. Army Corps of Engineers (Corps) representative verified the agent's delineation.

The applicant proposes to construct a bulkhead along the interior of the separated channel, behind the channel's adjacent wetlands, and along the PISC behind the wetlands. The applicant would mechanically dredge approximately 1,400 cubic yards of material in the channel to construct an approximate 40 by 175-foot turning basin at the west end of the channel and to make the channel bottom uniformly sloped from the edge of the proposed bulkhead to a depth of -9.5 feet MHT. The 1.004-acre wetland would be affected by the excavation activities to "clear out" the channel. The applicant also proposes to remove approximately 3,300 cubic yards of material that comprises the aforementioned earthen berm to connect the existing separate channel with the PISC. Additionally, the applicant proposes to dredge approximately 2,000 cubic yards of sediment between the PISC and a band of sea grasses to accommodate some proposed boat slips (details below). A total of approximately 6,700 cubic yards of unconsolidated muddy clay material would be transported in dump trucks and placed in nearby uplands on the property and contained with an earthen dike. The applicant conducted a submerged aquatic vegetation (seagrass) survey on April 9, 2005. Results of the survey indicated the presence of a 0.195-acre sea grass bed that parallels the shoreline and channel slope of the PISC. The dredging operation would only affect approximately 630 square feet (0.014 acre) of the seagrass observed in this area. The applicant stated that all construction will take place in accordance with the Texas Commission on Environmental Quality's (TCEQ's) Best Management Practices (BMP's).

Additionally, the applicant proposes to construct a marina complex comprised of several walkways and boat slips between the PISC and the band of seagrasses that parallels the shoreline and channel slope of the PISC. On the south side of the proposed channel cut, the applicant would construct a 6-foot-wide main walkway and six 3 by 68-foot and three 3 by 47-foot finger piers spaced 20 feet apart. On the southernmost end of the property, the applicant proposes to construct a concrete boat ramp. Construction of the boat ramp would require placement of 80 cubic yards of articulated concrete mat in navigable water and would require only minor dredging in the form of reworking the bottom between the ramp and the PISC to anchor the articulated mat. The aforementioned seagrass survey indicates that there are no seagrasses in the proposed boat ramp area. On the north side of the proposed channel cut, the applicant would construct a 6-foot-wide main walkway and four 3 by 54-foot and seven 3 by 30-foot finger piers spaced 20 feet apart.

To compensate for the excavation of 1.004 acres of estuarine inter-tidal scrub-shrub wetlands, the applicant proposes to create .91 acres of freshwater marsh habitat on the project site. The project involves impacts (from dredging) to approximately 630 square feet of sea grass. To mitigate these impacts the applicant proposes to transplant approximately 1,900 square feet of seagrass in an area approximately 24 inches below MHT located between the shoreline and the boat docks. CCC Project No.: 06-0182-F1; Type of Application: U.S.A.C.E. permit application #23898 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Program Specialist, Coastal Coordination Council, P. O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200601096

Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: February 28, 2006

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/06/06 - 03/12/06 is 18% for Consumer[1]/Agricultural/Commercial[2] credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/06/06 - 03/12/06 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3] for the period of 03/01/06 - 03/31/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 03/01/06 - 03/31/06 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/06 - 06/30/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/06 - 06/30/06 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 04/01/06 - 06/30/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The lender credit card quarterly rate as prescribed by §346.101, Tex. Fin. Code,[1] for the period of 04/01/06 - 06/30/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4] for the period of 04/01/06 - 06/30/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 04/01/06 - 06/30/06 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 04/01/06 - 06/30/06 is 18% for Consumer/Agricultural/Commercial credit thru $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 03/01/06 - 03/31/06 is 7.50% for Consumer/Agricultural/Commercial credit thru $250,000.

The judgment ceiling as prescribed §304.003 for the period of 03/01/06 - 03/31/06 is 7.50% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment, or other similar purpose.

[3] For variable rate commercial transactions only.

[4] Only for open end credit as defined in §301.002(14), Tex. Fin. Code.

TRD-200601044
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 27, 2006

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East Texas Council of Governments

Request for Proposals for Youth Stand Alone Projects

This Request for Qualifications to interested entities is filed under Government Code, Chapter 2254.

As the Administrative unit for the East Texas Workforce Development Board (ETWDB), the East Texas Council of Governments (ETCOG) is soliciting Request for Proposals (RFP) for the operation and management of Youth Stand Alone Projects for a period beginning July 1, 2006 and extending through June 30, 2007 with the availability of three, one-year additional options. Youth Stand Alone Projects are independently operated, year-round, model programs that provide allowable services under the Workforce Investment Act (WIA). The purpose of Stand Alone Youth projects are to help economically disadvantaged youth ages 14 through 21 achieve academic and employment success.

The mission of the East Texas Workforce Development Board (ETWB) is to improve the quality of life in this area through economic development by providing a first-class workforce for present and future businesses. Counties that comprise the East Texas Workforce Areas are: Anderson, Camp, Cherokee, Gregg, Harrison, Henderson, Marion, Panola, Rains, Rusk, Smith, Upshur, Van Zandt, and Wood Counties.

The East Texas Workforce Board is making approximately $224,213 available through this RFP to be distributed as follows:

Only 30% or $67,264 is available to serve In-School youth.

At least 70% or $156,949 must be used to serve Out-of-School youth.

Please Note that proposals are limited to $100,000.

The amount of funds available is subject to change. Projects may serve out-of-school youth exclusively. Of the total $224,213 available for stand-alone projects, not more then 30% or $67,264 total may be spent on in-school youth.

Persons or organizations wanting to receive a Request for Proposals (RFP) package, should submit a request by letter, fax, or e-mail to East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas 75662, Attn: Sally Batchelor. The fax number for ETCOG is (903) 983-1440 or e-mail sally.batchelor@twc.state.tx.us. Historically Underutilized Businesses (HUBs) are encouraged to apply.

Proposals will not be released prior to February 23, 2006. The deadline for receipt of proposals is Thursday, April 6, 2006 at 5:00 p.m. CDT. A bidder's conference has been scheduled for Thursday, March 9, 2006 at 1:30 p.m. at the ETCOG offices.

Questions concerning the RFP process should be addressed by e-mail or fax to Sally Batchelor, (see above) or Gary Allen, Section Chief, Planning and Board Support at gary.allen@twc.state.tx.us or fax (903) 983-1440.

TRD-200600983
Glynn Knight
Executive Director
East Texas Council of Governments
Filed: February 24, 2006

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Education Service Center, Region XIV

Request for Applications (RFA) Concerning Learn and Serve America: S.T.A.R.S. of Texas Grant Program

Filing Authority. This Request for Applications (RFA) is authorized under the National and Community Service Act of 1990, 42 USC 12521 et seq. (Learn and Serve America School-based Programs).

Eligible Applicants. The Texas Center for Service-Learning, a statewide initiative of Region 14 Education Service Center (ESC) in partnership with the Texas Education Agency, is requesting applications from public school districts, open enrollment charter schools, and shared services arrangements (SSAs) of public school districts and education service centers in Texas.

Description. Grant activities are for model initiatives that use the S.T.A.R.S. framework of service-learning (Student leadership, Thoughtful service, Authentic learning, Reflective practice, and Substantive partnerships) to meet state and local performance measures. Service-learning is a form of instruction in which students design projects to address community needs as part of their academic studies. Region 14 ESC will issue grants to eligible applicants to: (1) utilize student voice and choice in the design and implementation of K-12 service-learning activities; (2) involve students in each district in service-learning activities designed to improve the stewardship of Texas natural resources in collaboration with TxCSL statewide partners; (3) involve students in service-learning activities that meet other local community needs as defined by needs assessment activities; (4) increase the academic engagement of student participants as measured by pre- and post student surveys; (5) utilize teacher-facilitated reflection in a variety of formats (written, verbal, visual, electronic) to promote critical thinking and analytical skills in preparing for, implementing, and evaluating service-learning experiences; (6) develop meaningful partnerships with organizations and individuals (including parents and community members of all ages) to implement the project successfully and sustain service-learning as a regular instructional practice; (7) take measures to institutionalize service-learning through the development of policies, leadership and champions, incentives, revenue streams, infrastructure for support, and visibility and tangible evidence of success; (8) collect information about successful or model efforts for the purpose of project replication, adoption, and adaptation; (9) ensure participation in all required trainings and meetings offered through TxCSL and/or through SSA providers; and (10) meet all evaluation requirements as specified in the RFA and/or by the program evaluator, TxCSL, Region 14 ESC, TEA, and CNCS. Applicants must also ensure that their programs address any other requirements specified in the RFA.

Dates of Project. All services and activities related to this application will be conducted within specified dates. The starting date will be no earlier than September 1, 2006, with an ending date of no later than August 31, 2007. Programs will be eligible for two years of continuation funding based on evidence of satisfactory progress.

Project Amount. A range of contracts will be awarded from $15,000 to $70,000 based on student ADA. SSAs are allowable to a maximum of $150,000. A total of $950,000 is available for grant awards. Applicants must provide matching funds for the grant at the rate of 1:1 in cash or in kind. Matching funds may come from any source, including federal funds, that does not specifically prohibit such use. Funds authorized by or through CNCS, however, may not be used as matching. Continuation funding will be based on satisfactory progress and on general budget approval by the Corporation for National and Community Service (CNCS), the Texas Education Agency, and Region 14 ESC. This project is funded 100% from CNCS federal funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Region 14 ESC will base its selection on, among other things, the demonstrated competence and qualifications of the applicant. Special consideration will be given to ensure geographic and organizational diversity among applicants. Region 14 ESC reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

Region 14 ESC is not obligated to execute a resulting grant award, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit Region 14 ESC to pay any costs incurred before an application is approved. The issuance of this RFA does not obligate Region 14 ESC to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the RFA may be obtained by downloading the application from the Texas Center website at www.txcsl.org; by writing the Texas Center for Service-Learning, 1106 Clayton Lane, Suite 420E, Austin, Texas 78723; or by calling (512) 420-0214.

Further Information. For clarifying information about the RFA, contact the Texas Center for Service-Learning at (512) 420-0214. Opportunities for technical assistance will also be indicated in the RFA.

Deadline for Receipt of Applications. Applications must be received by mail or delivery service at the Texas Center for Service-Learning by 4:00 p.m. (Central Standard Time), Friday, April 28, 2006, to be considered. Facsimile and e-mail copies will not be accepted.

Request for Volunteer Reviewers. Region 14 ESC is requesting individuals, especially educators with prior service-learning experience, to volunteer to serve on the competitive review panel for this grant program. Grant writers and applicants who serve on the review panel can gain valuable insight into the quality of a variety of grant applications, and all members of the review panel can contribute toward ensuring the success of the schoolchildren in Texas by volunteering for this critical effort.

TRD-200600955
Ronnie Kincaid
Executive Director
Education Service Center, Region XIV
Filed: February 22, 2006

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Texas Commission on Environmental Quality

Notice of Intent to Perform a Removal Action at the PolyCycle Industries, Inc., State Superfund Site, Jacksonville, Cherokee County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ) issues this public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the PolyCycle Industries (PCI), Jacksonville, state Superfund site (the site). The site, including all land, structures, appurtenances, and other improvements, is approximately 7.006 acres located at 2505 South Jackson Street, Jacksonville, Cherokee County, Texas. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

PCI conducted a lead battery recycling operation at the site from 1978 to 1983. The facility recycled lead from lead acid batteries and cases. The sulfuric acid was drained from the batteries, and the lead plates were removed. The sulfuric acid was sent to a hazardous waste dis-

posal firm, and the lead plates were sold to a lead smelter. The battery cases were ground and washed in four unlined surface impoundments to remove the lead and lead sulfate. The chips were skimmed from the surfaces of the impoundments and sold to plastic recyclers. The lead and lead sulfate sediments on the bottoms of the impoundments were sold to a lead smelter.

In 1983, the Texas Department of Health (TDH) found concentrations of lead over 100,000 milligram per kilogram (mg/kg) in the soil and issued a compliance order requiring PCI to remove all soil with lead concentrations greater than 1,000 mg/kg. PCI removed contaminated soil from the Jacksonville location to the PCI Tecula location. The TDH conducted post-removal sampling in 1984 and accepted clean closure of the Jacksonville site, based on the lead concentrations in soil. PCI then sold the site to Texas Farm Products, Inc. (TFPI). TFPI removed all remaining PolyCycle structures and built the "Lone Star Feed Store." In 1999, TFPI sold 1.86 acres to Dement Chiropractic Fitness Center, which built an outdoor swimming pool and a volleyball court just north of the feed store.

In March 1991, the Field Investigation Team of the United States Environmental Protection Agency, Region 6, conducted a site screening investigation at the site to verify the effectiveness of the removal action performed by PCI. On-site lead concentrations were between 100 - 400 mg/kg, except for two samples. One sample had a lead concentration of 3,780 mg/kg and the other had 43,500 mg/kg.

In February 2000, the analytical results from the soil samples collected by TCEQ showed the lead concentrations ranging from 3,100 to 4,800 mg/kg. Chips of battery casings were visible in the roadside ditch in front of the feed store. A Hazard Ranking System (HRS) evaluation was conducted by the TCEQ, and an HRS score of 6.09 was assigned to the site. At a public meeting conducted on January 15, 2004, at the Jacksonville Public Library, TCEQ proposed to clean up the site to a commercial/industrial level; and the site was proposed for listing to the state Superfund registry in the December 5, 2003 issue of the *Texas Register* (28 TexReg 11012) under THSC, Chapter 361, Subchapter F.

The TCEQ conducted a remedial investigation during which soil and groundwater samples were analyzed. Soil lead concentrations were found to be above the health-based protective concentration level (PCL) at two locations north of the feed store and one location northeast of Dement Chiropractic Fitness Center. Eleven monitor wells were installed to collect groundwater samples. A groundwater sample collected from the monitoring well (MW-3), located to the west of the feed store near a ditch (location of a former railroad track), showed concentrations of beryllium above the PCL of 0.004 milligram per liter. Additionally, groundwater samples from two other wells installed at the former unlined impoundments showed the presence of beryllium, but at concentrations below the PCL. Soil samples collected at these former impoundment locations also showed the presence of beryllium.

To prevent migration of the contaminants, especially the beryllium in groundwater, the TCEQ has determined that a removal action is appropriate at the site. This removal action will achieve significant cost savings for the site. The TCEQ plans to remove the lead-contaminated soil that is above PCLs from the two locations north of the feed store and the one location northeast of Dement Chiropractic Fitness Center. Additionally, the contaminated soil surrounding monitor well MW-3 will also be excavated and removed from the site. All excavated soil will be disposed of at an approved off-site facility. The excavated areas will be sampled to confirm the removal of contamination and will be backfilled with clean soil. After the completion of the removal action, all the monitor wells will be plugged and abandoned.

A portion of the records for this site is available for review during regular business hours at the Jacksonville Public Library, 502 South Jackson Street, Jacksonville, Texas. The copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to an access ramp that is between Buildings D and E.

For further information, please contact Mr. Subhash C. Pal, P.E., TCEQ Project Manager, Remediation Division, at (512) 239-4513, or Mr. Bruce McAnally, TCEQ Community Relations Coordinator at (512) 239-2141.

TRD-200601094
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: February 28, 2006

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 35 and the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning state implementation plans (SIPs).

The proposed rulemaking would implement requirements of House Bill 2949, 79th Legislature, 2005. The proposed rulemaking would expand the list of actions that can be authorized by an emergency order to include the repair or replacement of roads, bridges, or other infrastructure improvements. Additionally, the proposed rulemaking would authorize an applicant to list loss of a critical transportation thoroughfare as a reason why the construction and emissions are essential.

A public hearing on this proposal will be held in Austin on April 4, 2006, at 10:00 a.m. in Building B, Room 201A, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, a staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs, should contact Lola Brown, Office of Legal Services at (512) 239-0348. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-070-035-LS. Comments must be received by 5:00 p.m., April 10, 2006. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*.

For further information, please contact Les Trobman, Environmental Law Division, at (512) 239-6056.

TRD-200600973
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: February 24, 2006

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 10, 2006**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P. O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 10, 2006**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Anadarko Petroleum Corporation; DOCKET NUMBER: 2005-1825-AIR-E; IDENTIFIER: Regulated Entity Reference Number (RN) RN104695093; LOCATION: Douchette, Tyler County, Texas; TYPE OF FACILITY: oil and natural gas production station; RULE VIOLATED: 30 TAC §116.110(a)(2) and THSC, §382.085(b) and §382.0518(a), by failing to satisfy the conditions of a standard permit; 30 TAC §106.352(1) and §116.110(a)(4) and THSC, §382.085(b), by failing to satisfy the conditions of a permit by rule for the station; 30 TAC §106.512(1) and §116.110(a)(4) and THSC, §382.085(b), by failing to submit a timely PI-7 form for permit by rule registration after construction began at the station; 30 TAC §111.201 and THSC, §382.085(b), by failing to prevent unauthorized outdoor burning; and 30 TAC §111.111(a)(4)(A)(i) and (ii) and THSC, §382.085(b), by failing to prevent visible emissions; PENALTY: $6,400; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(2) COMPANY: City of Anahuac; DOCKET NUMBER: 2004-2124-PWS-E; IDENTIFIER: Public Water Supply Identification Number 0360001, RN101188761; LOCATION: Anahuac, Chambers County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and (5) and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) for total trihalomethanes (TTHM) and haloacetic acids; PENALTY: $508; ENFORCEMENT COORDINATOR: Edward Moderow, (512) 239-2680; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Azteca Milling, L.P.; DOCKET NUMBER: 2003-1429-AIR-E; IDENTIFIER: Air Account Number HA0106T, RN100215086; LOCATION: Plainview, Hale County, Texas; TYPE OF FACILITY: corn flour milling; RULE VIOLATED: 30 TAC §122.145(2)(C) and §122.146(2) and THSC, §382.085(b), by failing to submit the annual Title V Compliance Certification; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(4) COMPANY: Cardinal Meadows Improvement District; DOCKET NUMBER: 2005-1866-MWD-E; IDENTIFIER: RN104416417; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: sewage collection system; RULE VIOLATED: the Code, §26.121(a), by failing to prevent an unauthorized discharge of raw sewage from the collection system; 30 TAC §317.3(c)(2) and (e)(5), by failing to provide a firm pumping capacity and by failing to provide an operational audiovisual alarm at the lift station; PENALTY: $2,568; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: May Carson dba Cornudas Restaurant; DOCKET NUMBER: 2005-1347-PWS-E; IDENTIFIER: RN101198265; LOCATION: Salt Flat, Hudspeth County, Texas; TYPE OF FACILITY: restaurant; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and (ii) and THSC, §341.033(d), by failing to collect routine bacteriological samples and by failing to collect repeat samples following a coliform-positive result; and 30 TAC §290.122(c)(2)(B), by failing to post public notice of monitoring violations; PENALTY: $1,755; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(6) COMPANY: Flat Fork Water Supply Corporation; DOCKET NUMBER: 2005-2045-PWS-E; IDENTIFIER: RN101441848; LOCATION: Center, Shelby County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the MCL for TTHM; PENALTY: $298; ENFORCEMENT COORDINATOR: Epifanio Villareal, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: Georgia Gulf Chemicals & Vinyls, L.L.C.; DOCKET NUMBER: 2005-0766-AIR-E; IDENTIFIER: RN100213958; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(c) and §117.206(c)(3)(A), New Source Review (NSR) Air Permit Number 4825A, and THSC, §382.085(b), by failing to comply with emissions limits; 30 TAC §101.20(1) and §116.115(c), 40 Code of Federal Regulations Part 60, Appendix F, NSR Air Permit Number 4825A, and THSC, §382.085(b), by failing to comply with the relative accuracy required of Emission Point Numbers 12's continuous monitoring system; PENALTY: $5,656; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Jesamin, Inc. dba Davis Quick Stop; DOCKET NUMBER: 2005-1462-PST-E; IDENTIFIER: RN101538692; LOCATION: North Richland Hills, Tarrant County, Texas; TYPE OF FACILITY:

convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a method of release detection; 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain a copy of the California Air Resources Board Executive Order for the Stage II vapor recovery system (VRS) and any related components; 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct inspections of the Stage II VRS for defects; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure the facility representative received training and instruction in the operation and maintenance of the Stage II VRS; and 30 TAC §334.48(c), by failing to conduct inventory control for all underground storage tanks (USTs); PENALTY: $5,120; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Lamb County Hospital dba Lamb Healthcare Center; DOCKET NUMBER: 2005-0806-PST-E; IDENTIFIER: RN101839488; LOCATION: Littlefield, Lamb County, Texas; TYPE OF FACILITY: county hospital; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(iii) and (B)(ii), by failing to renew a previously issued UST delivery certificate by timely and proper submission of a new UST registration and self-certification form to the agency and ensuring that a valid, current delivery certificate was posted at the facility; PENALTY: $616; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(10) COMPANY: Lyondell-Citgo Refining L.P.; DOCKET NUMBER: 2005-1985-AIR-E; IDENTIFIER: RN100218130; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: oil refinery; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), Flexible Air Permit Number 2167/PSD-TX-985, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: S. M. S. Enterprises, Inc. dba AZ Food Store; DOCKET NUMBER: 2005-0689-PST-E; IDENTIFIER: RN100872761; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2)(A)(i)(III) and the Code, §26.3475(a) and (c)(1), by failing to have a proper release detection method, by failing to have each pressurized line tested or monitored for releases, and by failing to have line leak detectors tested; and 30 TAC §334.10(b), by failing to maintain legible copies of all required records pertaining to a UST system; PENALTY: $4,162; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Special Camps for Special Kids; DOCKET NUMBER: 2005-0969-MWD-E; IDENTIFIER: RN102078409; LOCATION: Clifton, Bosque County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (17), Texas Pollutant Discharge Elimination System Permit Number WQ0013536001, and the Code, §26.121(a), by failing to comply with the permitted effluent limits for total suspended solids, five-day biochemical oxygen demand, and chlorine and by failing to submit the annual sludge report; PENALTY: $5,344; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(13) COMPANY: Synergy Management Group, L.L.C.; DOCKET NUMBER: 2005-1585-MSW-E; IDENTIFIER: RN103933362; LOCATION: Stamford, Haskell County, Texas; TYPE OF FACILITY: scrap tire storage and processing; RULE VIOLATED: 30 TAC §328.61(b)(1) and (3), (c), and (h), by failing to maintain the area of a used/scrap tire pile under 8,000 square feet, by failing to lock trailers storing scrap tires/tire pieces and enclose the facility with a security fence, and by failing to maintain designated all-weather fire lanes and roads within and surrounding the tire pile area and fire extinguishers; and 30 TAC §328.54(d), by failing to have identification on the vehicles/trailers used to transport used and/or scrap tires; PENALTY: $6,936; ENFORCEMENT COORDINATOR: Marlin Bullard, (254) 751-0335; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(14) COMPANY: Trammell Crow Residential Company dba Silverado Apartments; DOCKET NUMBER: 2004-0880-EAQ-E; IDENTIFIER: Edwards Aquifer Registration Number 11-01092401, RN102929908; LOCATION: Cedar Park, Williamson County, Texas; TYPE OF FACILITY: apartment complex; RULE VIOLATED: 30 TAC §213.4(k), by failing to comply with the best management practices specified by an approved Edwards Aquifer protection plan; and the Code, §26.121(a), by failing to prevent unauthorized discharges; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

TRD-200601095
Stephanie Bergeron Perdue
Acting Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality
Filed: February 28, 2006

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, Aransas County NRC Art.33.136 Sketch No. 4, submitted by J. L. Brundrett, Jr., an Aransas County Surveyor, conducted in March 2005, locating the following shoreline boundary:

A survey of a portion of the MHHW Line of Aransas Bay adjacent to San Jose Island Ranch Boat House.

For a copy of this survey, contact Archives & Records, Texas General Land Office at (512) 463-5277.

TRD-200601195
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: March 1, 2006

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Notice of Invitation for Offers of Major Consulting Services

Pursuant to §§2254.021 - 2254.040 of the Texas Government Code, the Texas General Land Office (GLO) is seeking major consulting services to assist the GLO in examining the GLO's current real estate investment practices and determine if and what needs to be done internally to improve such practices. The requested consultant will examine how the GLO should initiate, or better implement, the following goals:

Meeting financial accounting and reporting standards under both the Financial Accounting Standards Board (FASB) and the Governmental

Accounting Standards Board (GASB) for the Texas Legislature's and the Comptroller's performance measures, respectively;

Developing processes to handle joint venture partnerships and their accounting and reporting standards under FASB and GASB;

Selecting and/or creating financial planning and forecasting software, and training GLO personnel on its operation;

Examining the current accounts receivable system, and making any necessary recommendations to either improve or streamline the system;

Selecting and/or creating software that provides for escalation clauses in leases, and training GLO personnel on its operation;

Proposing and developing a standard format for reporting and capturing revenue from Permanent School Fund real estate investments;

Improving the current accounting system to handle the aforementioned changes; and

Any other ancillary systems or services necessary to manage the foregoing.

The GLO reserves the right to evaluate the qualifications and experience of any Respondents, to reject any and/or all responses, and to negotiate specific terms of an agreement that is in the best interest of the state. The closing date for receipt of offers of these consulting services is 5:00 p.m. CDT, April 12, 2006. Further information may be obtained by contacting Scott Coulter, General Land Office, 1700 N. Congress Avenue, Austin, TX 78701-1495, phone (512) 475-1427.

TRD-200601298
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: March 1, 2006

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Office of the Governor

Request for Grant Applications (RFA) for the Crime Stoppers Assistance Fund Program

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications to provide grants to certified Crime Stoppers organizations in Texas during the state fiscal year 2007 grant cycle.

Purpose: The purpose of the Crime Stoppers Assistance funding is to enhance and assist the community's efforts in solving serious crimes.

Available Funding: State funding is authorized for these projects under Article 102.013, *Texas Code of Criminal Procedure*, which designates CJD as the funds administering agency. The source of funding is a biennial appropriation by the Texas Legislature from funds collected through court costs and fees.

Funding Levels:

(1) Minimum grant award: $1,500.

(2) Maximum grant award: $15,000.

Standards: Grantees will comply with the standards applicable to this funding source cited in the *Texas Administrative Code*, Title 1, Part 1, Chapter 3, and the statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) admission fees or tickets to any amusement park, recreational activity or sporting event;

(2) attorney fees;

(3) construction;

(4) contributions;

(5) extended equipment services arrangements;

(6) food, meals, beverages, or other refreshments unless the expense is for a working event where full participation by participants mandates the provision of food and beverages and the event is not related to amusement and/or social activities in any way;

(7) fundraising;

(8) legal services for adult offenders;

(9) lobbying;

(10) medical services;

(11) membership dues for individuals;

(12) office space rental;

(13) overtime pay;

(14) promotional advertisements of any kind;

(15) promotional gifts;

(16) proselytizing or sectarian worship;

(17) purchase or improvement of real estate;

(18) rewards, except for statewide projects;

(19) subscription fees;

(20) transportation, lodging, per diem, or any related costs for participants, when grant funds are used to develop and conduct training;

(21) vehicles or equipment for government agencies that are for general agency use;

(22) weapons, ammunition, explosives, or military vehicles;

(23) any expense or service that is readily available at no cost to the grant project or that is provided by other federal, state or local funds (e.g., supplanting); and

(24) any portion of the salary of, or any other compensation for an elected or appointed government official, except in the case of a juvenile court or drug court.

Eligible Applicants: Eligible applicants are Crime Stoppers organizations as defined by Chapter 414.001 of the *Texas Government Code* that are certified by the Crime Stoppers Advisory Council to receive repayments under Articles 37.073 and 42.152 of the *Texas Code of Criminal Procedure*, or payments from a defendant under Article 42.12 of the *Texas Code of Criminal Procedure*. Section 414.001 of the *Texas Government Code* defines a "crime stoppers organization" as follows:

(1) a private, nonprofit organization that is operated on a local or statewide level, that accepts and expends donations for rewards to persons who report to the organization information about criminal activity and that forwards the information to the appropriate law enforcement agency; or

(2) a public organization that is operated on a local or statewide level, that pays rewards to persons who report to the organization information about criminal activity, and that forwards the information to the appropriate law enforcement agency.

Requirements: Crime Stoppers programs must focus on reducing crime through the operation of a hotline that receives information about criminal activities and fugitives from members of the public, guarantees

anonymity, forwards the information to the appropriate law enforcement agency, and pays rewards.

Project Period: Grant-funded projects must begin on or after September 1, 2006, and will expire on or before August 31, 2007.

Application Process: Eligible applicants can download an application kit from the Office of the Governor's web site located at http://www.governor.state.tx.us/divisions/cjd/formsappsview.

Closing Date for Receipt of Applications: All applications must be electronically submitted to the Office of the Governor, Criminal Justice Division via e-mail at cjdapps@governor.state.tx.us on or before May 22, 2006.

Selection Process: Applications are reviewed by CJD staff members or a review group selected by the Executive Director of CJD. CJD will make all final funding decisions based on eligibility, reasonableness of the project, availability of funding, and cost-effectiveness.

Contact person: If additional information is needed, contact Betty Bosarge at bbosarge@governor.state.tx.us or at (512) 463-1784.

TRD-200601075
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: February 28, 2006

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Department of State Health Services

Notice of Agreed Orders

The Department of State Health Services (department) issued an Agreed Order to the following registrants:

Mobile Health Testing (registration #R20178-000) of Pearland. A total penalty of $4,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Alexander Orlov, D.O., P.A. (registration #R27883-000) of Lufkin. A total penalty of $1,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Becker-Parkin Dental Supply Co., Inc. (registration #R19293-001) of Hempstead, NY. A total penalty of $4,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200601178
Cathy Campbell
General Counsel
Department of State Health Services
Filed: March 1, 2006

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Notice of Intent to Revoke Certificates of Registration

Pursuant to 25 Texas Administrative Code, §289.205, the Department of State Health Services (department), filed complaints against the following x-ray machine or laser registrants: San Angelo State School, Carlsbad, R00210; East Glen Animal Hospital, El Paso, R12411; Amarillo Endodontics, Amarillo, R19018; Pearson Chiropractic, Arlington, R19517; Joni J. Childers, D.D.S., San Antonio, R23486; Ronald S. Stanko, D.D.S., PC, Granbury, R24218; Nokia Mobile Phones, Inc., Fort Worth, R24326; Arlington ABC Clinic, Arlington, R24550; Silver Creek Dental, Pearland, R25689; Dentures & Dental Services, Inc., Odessa, R25835; Healthview, L.L.C., Dallas, R25963; Dental Resource Network, Carrollton, R26860; Teresa E. Canzoneri, D.D.S., PA, Dallas, R27683; Debra G. Stewart, D.D.S. & Donald R. Tamplen, D.D.S., Stafford, R27755; Robert Simer, D.V.M., Perryton, R27832; Bellaire Medical Center, Houston, Z00715.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the department that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the department within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Radiation Program Officer, 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200601180
Cathy Campbell
General Counsel
Department of State Health Services
Filed: March 1, 2006

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Notice of Intent to Revoke Radioactive Material Licenses

Pursuant to 25 Texas Administrative Code, §289.205, the Department of State Health Services (department), filed complaints against the following licensees: Nasser Cardiology, PA, The Woodlands, L05434; Metroplex Veterinary Centre, Irving, L05604; Physicians' Metroplex Hospital, Arlington, L05658.

The complaints allege that these licensees have failed to pay required annual fees. The department intends to revoke the radioactive material licenses; order the licensees to cease and desist use of such radioactive materials; order the licensees to divest themselves of the radioactive material; and order the licensees to present evidence satisfactory to the department that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the licensees for a hearing to show cause why the radioactive material licenses should not be revoked. A written request for a hearing must be received by the department within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff,

P.E., Radiation Program Officer, 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the radioactive material licenses will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200601181
Cathy Campbell
General Counsel
Department of State Health Services
Filed: March 1, 2006

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Notice to Withdraw Preliminary Reports for Assessment of Administrative Penalties and Notices of Violations

The Department of State Health Services (department) has withdrawn notices of violations and proposals to assess administrative penalties regarding the following registrants:

Wadley Regional Medical Center (registrant #L02486-000) of Texarkana. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

Gulf Coast Cancer Center (registrant #L05194-000) of Pasadena. A total penalty of $4,000 was proposed to be assessed for alleged violation of 25 Texas Administrative Code, Chapter 289.

Spohn Hospital (registrant #L02495-000) of Corpus Christi. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

Reinhart and Associates, Inc. (registrant #L03189-004) of Austin. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

Siemens Medical Solutions USA, Inc. (registrant #L05884-000) of Dallas. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

Gamma Surveys LLC (registrant #L05155-004) of La Porte. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

Chappell Hill Logging Systems, Inc. (registrant #L05374-000) of Chappell Hill. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

KI4U (registrant #L05515-000) of Gonzales. A total penalty of $4,000 was proposed to be assessed for alleged violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200601179
Cathy Campbell
General Counsel
Department of State Health Services
Filed: March 1, 2006

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Texas Health and Human Services Commission

Notice of Hearing on Proposed Medicaid Nursing Facility Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on March 24, 2006, to receive public comment on proposed payment rates for the Nursing Facility program operated by the Texas Department of Aging and Disability Services. These payment rates are proposed to be effective retroactive to January 1, 2006. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires a public hearing on proposed payment rates. The public hearing will be held on March 24, 2006, at 1:30 p.m. in room 560W of the John H. Winters Building, 701 West 51st Street, Austin, Texas 78751. Written comments regarding payment rates may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Joyce Felix, HHSC Rate Analysis, MC H-400, P.O. Box 85200, Austin, Texas 78708-5200. Express mail can be sent, or written comments can be hand delivered, to Ms. Felix, HHSC Rate Analysis, MC H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Ms. Felix at (512) 491-1998. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Joyce Felix at (512) 491-1174 or at HHSC Rate Analysis, MC H-400, P.O. Box 85200, Austin, Texas 78708-5200.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Ms. Felix by March 20, 2006, so that appropriate arrangements can be made.

Proposal. As single state agency for the state Medicaid program, the Health and Human Services Commission proposes new per diem payment rates for the nursing facility program operated by the Texas Department of Aging and Disability Services. These proposed rates are based on the rates in effect December 31, 2005, plus an average 11.75 percent increase, which reflects the availability of additional appropriated state and federal funds for nursing facility services.

Payment rates are proposed to be effective January 1, 2006 as follows:

Rates by TILE (Texas Index for Level of Effort) class:

TILE	TILE Base Rate
201	$164.43
202	$146.72
203	$138.84
204	$116.13
205	$107.87
206	$109.08
207	$99.10
208	$95.75
209	$89.34
210	$77.87
211	$75.06
212 (default)	$75.06
Supplemental Payments:	
Ventilator - Continuous	$89.37
Ventilator - Less than Continuous	$35.75
Pediatric Tracheostomy	$53.62

Methodology and justification. The proposed rates in the chart above were determined in accordance with the rate setting methodology at 1 TAC Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.307 (relating to Reimbursement Setting Methodology) and §355.308 (relating to Enhanced Direct Care Staff Rate). These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A (relating to Cost Determination Process), §355.101 (relating to Introduction) and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs).

Facilities participating in the Enhanced Direct Care Staff Rate will receive one of the following payment rates per day in addition to the above payment rates based upon their level of enrollment in the Enhanced Direct Care Staff Rate:

Minutes Associated with Proposed Rate	Proposed Rate Per Diem
1 LVN Minute = 1.88 Aide Minutes = 0.68 RN Minutes	$0.34
2 LVN Minutes = 3.75 Aide Minutes = 1.36 RN Minutes	$0.67
3 LVN Minutes = 5.63 Aide Minutes = 2.05 RN Minutes	$1.00
4 LVN Minutes = 7.50 Aide Minutes = 2.73 RN Minutes	$1.33
5 LVN Minutes = 9.38 Aide Minutes = 3.41 RN Minutes	$1.66
6 LVN Minutes = 11.25 Aide Minutes = 4.09 RN Minutes	$1.99
7 LVN Minutes = 13.13 Aide Minutes = 4.77 RN Minutes	$2.32
8 LVN Minutes = 15.00 Aide Minutes = 5.45 RN Minutes	$2.65
9 LVN Minutes = 16.88 Aide Minutes = 6.14 RN Minutes	$2.98
10 LVN Minutes = 18.75 Aide Minutes = 6.82 RN Minutes	$3.31
11 LVN Minutes = 20.63 Aide Minutes = 7.50 RN Minutes	$3.64
12 LVN Minutes = 22.50 Aide Minutes = 8.18 RN Minutes	$3.97
13 LVN Minutes = 24.38 Aide Minutes = 8.86 RN Minutes	$4.30
14 LVN Minutes = 26.25 Aide Minutes = 9.55 RN Minutes	$4.63
15 LVN Minutes = 28.13 Aide Minutes = 10.23 RN Minutes	$4.96
16 LVN Minutes = 30.00 Aide Minutes = 10.91 RN Minutes	$5.29
17 LVN Minutes = 31.88 Aide Minutes = 11.59 RN Minutes	$5.62
18 LVN Minutes = 33.75 Aide Minutes = 12.27 RN Minutes	$5.95
19 LVN Minutes = 35.63 Aide Minutes = 12.95 RN Minutes	$6.28
20 LVN Minutes = 37.50 Aide Minutes = 13.64 RN Minutes	$6.61
21 LVN Minutes = 39.38 Aide Minutes = 14.32 RN Minutes	$6.94
22 LVN Minutes = 41.25 Aide Minutes = 15.00 RN Minutes	$7.27
23 LVN Minutes = 43.13 Aide Minutes = 15.68 RN Minutes	$7.60
24 LVN Minutes = 45.00 Aide Minutes = 16.36 RN Minutes	$7.93
25 LVN Minutes = 46.88 Aide Minutes = 17.05 RN Minutes	$8.26
26 LVN Minutes = 48.75 Aide Minutes = 17.73 RN Minutes	$8.59
27 LVN Minutes = 50.63 Aide Minutes = 18.41 RN Minutes	$8.92

Methodology and justification. The proposed rates in the chart above were determined in accordance with the rate setting methodology at 1 TAC Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.308 (relating to Enhanced Direct Care Staff Rate). These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A (relating to Cost Determination Process), §355.101 (relating to Introduction) and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs).

Facilities that verify liability insurance coverage acceptable to HHSC will receive one of the following payment rates per day in addition to the above payment rates based upon the type of liability insurance coverage they maintain:

Type of Liability Insurance	Proposed Rate Per Diem
General and Professional	$1.89
Professional Only	$1.73
General Only	$0.16

Methodology and justification. The proposed rates in the chart above were determined in accordance with the rate setting methodology at 1 TAC Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.307 (relating to Reimbursement Setting Methodology) and §355.312 (relating to Reimbursement Setting Methodology - Liability Insurance Costs). These rates were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A (relating to Cost Determination Process), §355.101 (relating to Introduction) and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs).

TRD-200601177
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: March 1, 2006

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 06-003, Amendment Number 721, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The purpose of this amendment is to revise the reimbursement methodology used to make for additional payments to high-volume ambulatory surgical centers (ASCs) and hospital ASCs (HASCs). The proposed amendment is to be effective January 1, 2006.

The proposed amendment is estimated to result in annual aggregate spending of approximately $2.3 million for state fiscal year (SFY) 2006, with approximately $1.4 million in federal funds and approximately $900,000 in state general revenue, and annual aggregate spending of approximately $3.5 million for SFY 2007, with approximately $2.1 million in federal funds and approximately $1.4 million in state general revenue. Funding for payments to high-volume Medicaid providers was originally appropriated by the 77th Texas Legislature, Regular Session, 2001, and was continued by the 79th Texas Legislature, Regular Session, 2005.

To obtain copies of the proposed amendment, interested parties may contact Nancy Kimble by mail at Rate Analysis for Acute Care and Cost Reporting Services, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1363; by facsimile at (512) 491-1983; or by e-mail at nancy.kimble@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200601171
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 28, 2006

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 06-004, Amendment Number 722, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The purpose of this amendment is to revise the reimbursement methodology used to make additional payments to high-volume birthing centers. The proposed amendment is effective January 1, 2006.

The proposed amendment is estimated to result in annual aggregate spending of approximately $166,000 for state fiscal year (SFY) 2006, with approximately $100,696 in federal funds and approximately $65,304 in state general revenue, and annual aggregate spending of approximately $250,000 for SFY 2007, with approximately $151,650 in federal funds and approximately $98,350 in state general revenue. Funding for payments to high-volume Medicaid providers was originally appropriated by the 77th Texas Legislature, Regular Session, 2001, and was continued by the 79th Texas Legislature, Regular Session, 2005.

To obtain copies of the proposed amendment, interested parties may contact Nancy Kimble by mail at Rate Analysis for Acute Care and Cost Reporting Services, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1363; by facsimile at (512) 491-1983; or by e-mail at nancy.kimble@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200601172
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 28, 2006

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 06-012, Amendment Number 730, to the Texas State Plan for Medical Assistance, under Title XIX of the

Social Security Act. The purpose of this amendment is to increase the reimbursement for Medicaid professional services provided by nurse practitioners (NPs), clinical nurse specialists (CNSs), certified nurse midwives (CNMs), and certified registered nurse anesthetists (CRNAs) from 85 percent of the reimbursement for the same professional service paid to a physician (medical doctor or doctor of osteopathy) to 92 percent. The proposed amendment is effective March 1, 2006.

The proposed amendment is estimated to result in increased costs of $1,387,417.32 for state fiscal year (SFY) 2006, with approximately $841,884.83 in increased federal funds and approximately $545,532.49 in increased state general revenue, and annual estimated increased costs of $2,235,811.09 for SFY 2007, with approximately $1,358,702.40 in increased federal funds and approximately $877,108.69 in increased state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Nancy Kimble by mail at Rate Analysis for Acute Care and Cost Reporting Services, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1363; by facsimile at (512) 491-1972; or by e-mail at nancy.kimble@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200601173
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 28, 2006

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 06-007, Amendment Number 724, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The purpose of this amendment is to revise the reimbursement methodology for the Program for All-Inclusive Care for the Elderly (PACE) in response to new federal requirements imposed by the Medicare Prescription Drug, Improvement, and Medicare Modernization Act (MMA) of 2003. Effective January 1, 2006, individuals, including PACE clients, who are eligible for both Medicare and Medicaid services (i.e., dual-eligible clients) must obtain prescription drugs through a Medicare Part D prescription drug plan rather than through Medicaid. The proposed amendment is effective January 1, 2006.

The proposed amendment is estimated to result in cost savings of approximately $2.5 million for state fiscal year (SFY) 2006, with approximately $1.5 million cost savings in federal funds and approximately $1.0 million cost savings in state general revenue, and annual estimated cost savings of approximately $3.8 million for SFY 2007, with approximately $2.3 million cost savings in federal funds and approximately $1.5 million cost savings in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Bill Warburton by mail at Rate Analysis for Managed Care Services, Texas Health and Human Services Commission, P. O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1365; by facsimile at (512) 491-1983; or by e-mail at william.warburton@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200601291
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: March 1, 2006

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 06-013, Amendment Number 731, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The purpose of this amendment is to add program policy and reimbursement methodology for Medicaid services provided by physicians assistants (PAs) in response to Senate Bill 1, 79th Legislature, Regular Session, 2005, Health and Human Services Commission (HHSC) Appropriations Rider 72. The proposed amendment is effective July 1, 2006.

The proposed amendment is estimated to result in cost savings of $114,951.05 for state fiscal year (SFY) 2006, with approximately $69,752.30 cost savings in federal funds and approximately $45,198.75 cost savings in state general revenue, and annual estimated cost savings of $243,425.88 for SFY 2007, with approximately $147,929.91 cost savings in federal funds and approximately $95,495.97 cost savings in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Barbara Davenport, Policy Assistant, by mail at Policy Development Support, Medicaid/CHIP Division, Texas Health and Human Services Commission, P. O. Box 85200, H-600, Austin, Texas 78708-5200; by telephone at (512) 491-1104; by facsimile at (512) 491-1953; or by e-mail at Barbara.Davenport@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200601292
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: March 1, 2006

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Texas Department of Housing and Community Affairs

Notice of Funding Availability

HOME Investment Partnerships Program

PY 2006 Single Family Funding Cycle

The Texas Department of Housing and Community Affairs (Department) announces the availability of approximately $23,000,000 for the 2006 Single Family funding cycle for the HOME Investment Partnerships Program (HOME). The availability and use of these funds is subject to the State HOME Rules (10 TAC Chapter 53) and the Federal HOME regulations governing the HOME Program (24 CFR Part 92).

ALLOCATION OF PY 2006 FUNDS

Section 2306.111, Texas Government Code, mandates the Department to allocate housing funds awarded in the HOME Program to each Uniform State Service Region using the Regional Allocation Formula, developed by the Department.

Section 2306.111, Texas Government Code, also mandates the Department to allocate no less than 95 percent of the HOME Program Funds to applicants which serve households located in a non-participating jurisdiction (non-PJ). Subject to the availability of qualified applications,

a minimum of five percent of the annual HOME Program funds will be allocated to applicants serving persons with disabilities. HOME funds may be expended in a Participating Jurisdiction (PJ), only if it funds a rental development that serves persons with disabilities. No single family activities will be funded in a PJ.

ELIGIBLE APPLICANTS

* Units of General Local Government

* Nonprofit Organizations

* Public Housing Authorities (PHAs)

DESCRIPTION OF ACTIVITIES

Homebuyer Assistance (HBA)

Downpayment and closing cost assistance is provided to first time homebuyers for the acquisition of affordable single family housing.

Eligible first time homebuyers may receive loans up to $10,000 for down payment and closing costs. HBA assistance will be in the form of a 2nd or 3rd lien, 0% interest, 10-year deferred forgivable loan. The loan is to be repaid at the time of resale of the property, refinance of the first lien, repayment of the first lien, or if the unit ceases to be the assisted homebuyer's principal residence, if any of these occurs before the end of the 10-year term. The amount of recapture will be based on the pro-rata share of the remaining loan term.

At the completion of the assistance, all properties must meet all applicable codes and standards, as specified in the application guide. Compliance with the basic access standards in new construction, established by §2306.514, Texas Government Code, is also required for any applicants utilizing Federal or State funds administered by the Department in the construction of single family homes.

This activity will comprise 20% of the HOME allocation that will be available through the Regional Allocation Formula process, approximately $4,600,000.

Owner Occupied Housing Assistance (OCC)

Rehabilitation or reconstruction cost assistance, in the form of deferred forgivable or repayable loans, is provided to homeowners for the repair or reconstruction of their existing homes. The homes must be the principal residence of the homeowner.

At the completion of the assistance, all properties must meet all applicable codes and standards, as specified in the application guide. In addition, all housing that is reconstructed or rehabilitated with HOME funds must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with 24 CFR §92.251(a). If a home is reconstructed, the applicant must also ensure compliance with the universal design features in new construction, established by §2306.514, Texas Government Code, required for any applicants utilizing federal or state funds administered by the Department in the construction of single family homes.

This activity will comprise 65% of the HOME allocation that will be available through the Regional Allocation Formula process, approximately $15,100,000.

Tenant Based Rental Assistance (TBRA)

Rental subsidy and security and utility deposit assistance is provided to tenants, in accordance with written tenant selection policies, for a period not to exceed twenty four months. TBRA allows the assisted tenant to move to and live in any dwelling unit with a right to continued assistance with the condition that assisted families participate in a Self-Sufficiency Program.

This activity will comprise 15% of the HOME allocation that will be available through the Regional Allocation Formula process, approximately $3,500,000.

COMPETITIVE REVIEW OF APPLICATIONS

HOME project funds will be awarded competitively per State of Texas HOME Program Rules, 10 TAC §§53.50 - 53.63. General Selection Criteria is listed in the State of Texas HOME Program Rules, 10 TAC §§53.50 - 53.63, and forms the basis for the State's development of scoring criteria for each Activity. Scoring criteria will include the implementation of various bills, riders, and agency goals, and is defined in 10 TAC §53.61. The Department will conduct the review and scoring of all applications, by region where applicable, and make recommendations for funding.

SELECTION PROCESS

All applications for funds received are reviewed for threshold requirements regarding application documentation and compliance with Department requirements of previously awarded contracts. Qualifying applications are then ranked using scoring criteria in 10 TAC §53.61. The highest scoring OCC, HBA, and TBRA applicants will be recommended up to the limit of funds available per region, and area type. Should an Activity not have enough qualified applicants, the funds will be redirected to the next Activity in the region that had a higher number of qualified applicants.

APPLICATION PROCEDURES, FINAL FILING

The HOME Application Guide will be available on the Department's website at www.tdhca.state.tx.us on Friday, March 3, 2006, or you may call (512) 475-3993 to request a copy. Applications must be on forms provided by the Department, and cannot be altered or modified and must be in final form before submitting them to the Department.

Deadline date for submitting a COMPLETE application and application fee is Friday, April 28, 2006, at 5:00 p.m. CST. Regardless if an application is hand-delivered, mailed through the U.S. Postal Service, or sent through a private carrier such as Federal Express or Airborne, the application must be received by the Department no later than Friday, April 28, 2006, at 5:00 p.m. CST. Applications will not be accepted through facsimile.

Applications mailed via the U.S. Postal Service *must* be mailed to:

Texas Department of Housing and Community Affairs

Single Family Finance Production Division

P.O. Box 13941

Austin, Texas 78711-3941

Applications mailed by private carrier or hand-delivered will be received at the physical address of:

Texas Department of Housing and Community Affairs

Single Family Finance Production Division

221 East 11th Street

Austin, Texas 78701

Applicants are required to remit a non-refundable application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30 per application. Please send check, cashier's check or money order; do not send cash. Section 2306.147(b) of the Texas Government Code requires the Department to waive grant application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. These organizations must include proof

of their exempt status in lieu of the application fee. The application fee is not an eligible or reimbursable cost under the HOME Program.

Applications that do not meet the filing deadline and application fee requirements will be returned to the applicant and will not be considered for funding.

An applicant may appeal decisions made by the Department in accordance with 10 TAC §1.7 and §1.8.

This NOFA does not include text of the various applicable regulatory provisions that may be important to the HOME Program. For proper completion of the application, the Department strongly encourages potential applicants to review the State and Federal regulations and to attend application training workshops.

APPLICATION WORKSHOPS

The Department will present one-day HOME Program Application Workshops that will provide an overview of the HOME Program, application preparation and submission, evaluation criteria and information about the major Federal and State requirements that may affect a HOME project. The HOME Application Workshop schedule and registration will be posted on the Department's website at www.tdhca.state.tx.us on Friday, February 24, 2006.

RESOLUTION REQUIREMENTS

The Department requires that all applications submitted must include an original resolution from the applicant's direct governing body, authorizing the submission of the application.

AUDIT REQUIREMENTS

An applicant is not eligible to apply for funds or any other assistance from the Department unless a past audit or Audit Certification Form has been submitted to the Department in a satisfactory format on or before the application deadline for funds or other assistance per 10 TAC §1.3(b). This is a threshold requirement outlined in the application, therefore applications that have outstanding past audits will be disqualified. Staff will not recommend applications for funding to the Department's Governing Board unless all unresolved audit findings, questions or disallowed costs are resolved per 10 TAC §1.3(c).

TRD-200601299
William Dally
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: March 1, 2006

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Notice of Public Hearing

Multifamily Housing Revenue Bonds (Grove Village and Pleasant Village Apartments) Series 2006

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Frederick Douglass Elementary School, 226 N. Jim Miller Road, Dallas, Texas 75217, at 6:00 p.m. on March 29, 2006 with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $13,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Grove Village Limited Partnership, a limited partnership, and Pleasant Village Limited Partnership, a limited partnership, or a related persons or affiliates thereof (the "Borrowers") to finance a portion of the costs of acquiring, rehabilitating, and equipping two multifamily housing developments (the "Developments") described as follows: Grove Village Apartments is a 232-unit multifamily residential rental development located at 7209 South Loop 12, Dallas County, Texas and Pleasant Village Apartments is a 200-unit multifamily residential rental development located at 378 N. Jim Miller Road, Dallas County, Texas. The Developments initially will be owned by the Borrowers.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P. O. Box 13941 Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200600969
William Dally
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: February 24, 2006

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Public Hearing

Public Comment Period and Hearing Schedule for U.S. Department of Housing and Urban Development (HUD) Consolidated Planning Documents Required to Provide Hurricane Disaster Relief Assistance for the State of Texas

The Texas Department of Housing and Community Affairs (TDHCA) and the Office of Rural Community Affairs (ORCA) announce public comment periods and a combined hearing schedule to gather input on the following HUD required plans:

Amendments to the *2005-2009 State of Texas Consolidated Plan* and *2006 Consolidated Plan One Year Action Plan* to Provide Hurricane Disaster Relief Assistance. These amendments are required to more fully utilize HOME funding for disaster relief assistance. The public comment period for this document runs March 10, 2006, through April 10, 2006.

Development of a Texas Action Plan for Disaster Recovery. This plan is required to utilize HUD Community Development Block Grant funding associated with the Department of Defense Appropriations Act, 2006 (Public Law 109-148, approved December 30, 2005). The public comment period for this document runs March 10, 2006 through March 27, 2006. Note that this document has a shorter public comment period as allowed by a HUD waiver.

On March 10, 2006, both of these documents will be available for review on the following websites: www.tdhca.state.tx.us and www.orca.state.tx.us. Printed copies of the documents will be available upon request by calling (512) 475-3976.

Public hearings will be held at the following times and locations:

Nacogdoches

Nacogdoches Recreation Center

1112 North Street, Room 2

Nacogdoches, TX 75961

March 20, 2006, 6:00 p.m.

Beaumont

South East Texas Regional Planning Commission

2210 Eastex Freeway

Beaumont, TX 77703

March 21, 2006, 10:00 a.m.

Livingston

Livingston Municipal Complex

200 W. Church Street

Livingston, TX 77351

March 22, 2006, 10:00 a.m.

Austin

Stephen F. Austin Building

1700 N. Congress Avenue, Room 170

Austin, TX 78701

March 22, 2006, 6:00 p.m.

Public comment will be accepted directly at the public hearings, by mail, or via e-mail to the addresses below.

For comment on housing related activities:

TDHCA

Division of Policy and Public Affairs

P. O. Box 13941

Austin, TX 78711-3941

Fax: (512) 469-9606

E-mail: info@tdhca.state.tx.us

For comment on community development related activities:

ORCA

Attention: Oralia Cardenas

P. O. Box 12877

Austin, TX 78711

Fax: (512) 963-6776

E-mail: ocardenas@orca.state.tx.us

For more information on the hearings, contact TDHCA at (512) 475-3976.

Individuals who require a language interpreter for the hearing should contact Jorge Reyes at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados. Individuals who require auxiliary aids or services should contact Gina Esteves, ADA-Responsible Employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days prior to the scheduled hearing so that appropriate arrangements can be made.

TRD-200601092
William Dally
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 28, 2006

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Texas Department of Insurance

Company Licensing

Application to change the name of TRAVELERS INSURANCE COMPANY to METLIFE INSURANCE COMPANY OF CONNECTICUT, a foreign life, accident and/or health company. The home office is in Hartford, Connecticut.

Application to change the name of TRAVELERS LIFE & ANNUITY COMPANY to METLIFE LIFE AND ANNUITY COMPANY OF CONNECTICUT, a foreign life, accident and/or health company. The home office is in Hartford, Connecticut.

Application to change the name of AMICUS MUTUAL INSURANCE COMPANY to STONETRUST COMMERCIAL INSURANCE COMPANY., a foreign fire and/or casualty company. The home office is in Baton Rouge, Louisiana.

Application for admission to the State of Texas by THE GUARANTEE TITLE AND TRUST COMPANY, a foreign title company. The home office is in Cincinnati, Ohio.

Application for admission to the State of Texas by WESTERN AGRICULTURAL INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in West Des Moines, Iowa.

Application for admission to the State of Texas by SANTA FE AUTO INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Santa Fe, New Mexico.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200601302
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: March 1, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of COVENTRY MANAGEMENT SERVICES, INC. (using the assumed name of COVENTRY HEALTH MANAGEMENT SERVICES, INC.), a foreign third party administrator. The home office is in HARRISBURG, PENNSYLVANIA.

Application for admission to Texas of CORVEL HEALTHCARE CORPORATION, a foreign third party administrator. The home office is in IRVINE, CALIFORNIA.

Application for admission to Texas of MAGNABENEFITS SOLUTIONS, INC., a foreign third party administrator. The home office is in GRAND RAPIDS, MICHIGAN.

Application for incorporation in Texas of EMPLOYER EMPLOYEE BENEFIT ADMINISTRATORS, INC., a foreign third party administrator. The home office is in SAN ANTONIO, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200601303
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: March 1, 2006

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Joint Financial Regulatory Agencies

Notice of Public Meeting

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") jointly propose new §§153.13, 153.18, 153.20, and 153.22, concerning preclosing disclosures; limitation on application of proceeds; no blanks left to be filled in any instrument; and copies of documents relating to home equity lending under Texas Constitution, Article XVI, §50(a)(6). Existing interpretations §§153.13, 153.18, 153.20, and 153.22 are proposed for repeal in the *Texas Register*.

The Credit Union Commissioner and the Consumer Credit Commissioner have been delegated the authority to conduct a public meeting on behalf of the commissions for the purpose of receiving oral comments, views, and/or testimony concerning the proposed interpretations. A public meeting will be held in Austin on April 6, 2006, at 2:00 p.m. in the State Finance Commission Building, William F. Aldridge Hearing Room, located at 2601 North Lamar Boulevard. To be considered, an oral comment must be received at this public meeting; at the conclusion of the meeting, no further oral comments will be considered or accepted by the commissions.

Persons with disabilities who are planning to attend the meeting and have special communication or other accommodation needs should contact Joann McAnally at the Office of Consumer Credit Commissioner at (512) 936-7640. Requests should be made as far in advance of the meeting as possible.

TRD-200601157
Leslie L. Pettijohn
Commissioner
Joint Financial Regulatory Agencies
Filed: February 28, 2006

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Texas Department of Licensing and Regulation

Public Notice - Revised Enforcement Plan

The Texas Commission of Licensing and Regulation ("Commission") provides this public notice that at their regularly scheduled meeting held February 2, 2006, the Commission adopted the Texas Department of Licensing and Regulation's ("Department") revised enforcement plan which was established in compliance with Texas Occupations Code, §51.302(c).

Acts of the 79th Texas Legislature, Senate Bill 411, transferred the functions of the Texas Cosmetology Commission and the Texas State Board of Barber Examiners to the Texas Department of Licensing and Regulation effective September 1, 2005 and abolished both the Texas Cosmetology Commission and the Texas State Board of Barber Examiners. The Department's revised enforcement plan includes penalty matrices for Barbers and Barbershops, and Barber Schools, and Cosmetologists and Cosmetology Salons, and Cosmetology Schools.

The enforcement plan gives all license holders notice of the specific ranges of penalties and license sanctions that apply to specific alleged violations of the statutes and rules enforced by the Department. The enforcement plan also presents the criteria that are considered by the Department's Enforcement staff in determining the amount of a proposed administrative penalty or the magnitude of a proposed sanction.

There are four classes of violations for individual barber and cosmetologist licensees which range from less serious Class A violations to more serious Class D violations.

Class A violations are posting and public information violations, administrative violations, sanitation violations, facility and equipment violations, and violations by students.

Class B violations include practicing without proper license or inspection, administrative violations, violations by examination proctors, sanitation violations, facility and equipment violations, and violations by independent contractors.

Class C violations include unlicensed activity, administrative and advertising violations, sanitation and public health violations, and sanitation violations regarding whirlpool foot spas.

Class D violations include failure to comply with a previous order of the Commission or Executive Director, failure to pay a processing fee for a dishonored check, or engaging in fraud or deceit in obtaining a certificate, license, or permit.

There are five classes of violations for barber and cosmetology schools which range from less serious Class A violations to more serious Class D violations.

Class A violations are posting and public information violations, violations in operating a school, administrative and sanitation violations, and facility and equipment violations.

Class B violations include violations in operating a school, administrative and sanitation violations, and facility and equipment violations.

Class C violations include practicing without proper license or inspection, violations in operating a school, and refund and administrative violations.

Class D violations include unlicensed activity violations, advertising violations, sanitation and public health violations, and sanitation violations regarding whirlpool foot spas.

Class E violations include: granting credit for hours accrued while not under the supervision of a licensed instructor; directly or indirectly granting or approving student hours not correctly accrued; engaging in fraud or deceit in obtaining a certificate, license, or permit; failing to comply with a previous order of the Commission or Executive Director; failing to pay a processing fee for a dishonored check. Class E violations also include: failure of a private beauty culture school license holder to require a school term of not less than nine months and not less than 1,500 hours instruction for a complete course in cosmetology or not less than 600 hours instruction for a complete course in manicuring; and increasing, decreasing, or withholding the number of credit hours earned by a barber school student.

A copy of the revised enforcement plan is posted on the Department's homepage and may be downloaded at www.license.state.tx.us. You

may also contact the Enforcement Division at (512) 463-2906 or by e-mail at enforcement@license.state.tx.us to obtain a copy of the plan.

TRD-200601304
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: March 1, 2006

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Texas Lottery Commission

Instant Game Number 648 "Super 5's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 648 is "SUPER 5's". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 648 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 648.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol- The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 5 SYMBOL, $1.00, $2.00, $4.00, $5.00, $10,00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000, or $50,000.

D. Play Symbol Caption- The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 648 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
5 SYMBOL	WINALL
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$

$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 648 - 1.2E

CODE	PRIZE
FIV	$5
TEN	$10
FTN	$15
TWN	$20

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $500.

I. High-Tier Prize- A prize of $1,000, $5,000, or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (648), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 648-0000001-001.

L. Pack - A pack of "SUPER 5's" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SUPER 5's" Instant Game No. 648 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SUPER 5's" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the prize shown for that number. If a player reveals a "5" play symbol, the player wins all 20 prizes shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified; and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen or appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning Your Numbers on a ticket.

C. No duplicate Winning Numbers on a ticket.

D. No more than four like non-winning prize symbols on a ticket.

E. A non-winning prize symbol will never be the same as a winning prize symbol.

F. No prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e., 10 and $10).

G. No Your Number will match any Winning Number play symbol when the win all symbol appears on a ticket.

H. The win all symbol will only appear on intended winners as dictated by the prize structure.

I. The "5" symbol will only appear in the Your Numbers play area as indicated in the above play symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "SUPER 5's" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SUPER 5's" Instant Game prize of $1,000, $5,000, or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SUPER 5's" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office

Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SUPER 5's" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SUPER 5's" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 648. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 648 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	880,000	6.82
$10	400,000	15.00
$15	160,000	37.50
$20	140,000	42.86
$50	80,000	75.00
$100	15,000	400.00
$500	1,200	5,000.00
$1,000	225	26,666.67
$5,000	25	240,000.00
$50,000	7	857,142.86

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.58. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 648 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 648, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200601022
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 27, 2006

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North Central Texas Council of Governments

Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the April 15, 2005, issue of the *Texas Register* (30 TexReg 2332). The selected consultant will perform technical and professional work to conduct Phase 3.1 of the Thoroughfare Assessment Program for the Dallas-Fort Worth Region.

The consultant selected for this project is Kimley-Horn Associates, Inc., 12700 Park Central Drive, Suite 1800, Dallas, Texas 75251. The maximum amount of this contract is $1,874,711.

TRD-200601182
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: March 1, 2006

♦ ♦ ♦

Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the September 2, 2005, issue of the *Texas Register* (30 TexReg 5443). The selected consultant will perform technical and professional work for the Development of an Internet-Based Commuter Registration and Participation Tracking Application for the Employee Trip Reduction Program.

The consultant selected for this project is Ecology and Environment, Inc., 368 Pleasant View Drive, Lancaster, NY 14086. The maximum amount of this contract is $95,815.

TRD-200601183
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: March 1, 2006

♦ ♦ ♦

Texas Parks and Wildlife Department

Acceptance of Land Donation

Estero Llano Grande Site of the World Birding Center

In a meeting on April 6, 2006, the Texas Parks and Wildlife Commission (the Commission) will consider the proposed acceptance of unoccupied portions of approximately 18.5 acres in Hidalgo County as part of the City of Weslaco's contribution to the development of the

Estero Llano Grande site of the World Birding Center in Weslaco. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. The Commission will also consider authorizing the Texas Parks and Wildlife Department Executive Director to accept additional portions of the 18.5 acres as those areas are vacated. In January 2006, the Commission was briefed by Texas Parks and Wildlife Department staff regarding the proposed donation and staff was authorized to proceed with obtaining public input. On March 9, 2006, a public hearing is being held in Hidalgo County regarding the proposed donation. Before taking action, the Commission will take public comment regarding the proposed transaction. Prior to the date of the meeting, public comment may be submitted to Martha "Marcy" Martinez, Texas Parks and Wildlife Department, 154A Lakeview Drive, Weslaco, Texas 78596 or by email at martha.martinez@tpwd.state.tx.us.

TRD-200601293
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: March 1, 2006

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Acceptance of Land Transfer

Richland Creek Wildlife Management Area

In a meeting on April 6, 2006, the Texas Parks and Wildlife Commission (the Commission) will consider the proposed acceptance of approximately 68 acres located in Freestone County within the Richland Creek Wildlife Management Area. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Prior to the date of the meeting, public comment may be submitted to Dennis Gissell, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at dennis.gissell@tpwd.state.tx.us.

TRD-200601294
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: March 1, 2006

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Mineral Lease

Oil and Gas Nomination, Alazan Bayou Wildlife Management Area, Nacogdoches County

In a meeting on April 6, 2006, the Texas Parks and Wildlife Commission (the Commission) will consider a request by Angelina Gathering Company, LLC to use of a portion of real property at Alazan Bayou Wildlife Management Area to construct a six-inch pipeline and operate the line for the transfer of natural gas within a designated right-of-way easement. TPWD staff has provided a surface use agreement to survey the proposed easement and issued a construction license to bore and install the line under the facility. Some vegetation removal will be required within the easement but surface soil disturbance is not anticipated. The staff recommendation is to approve the easement for a period of 10 years. Prior to the date of the meeting, public comment may be submitted to Dennis Gissell, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at dennis.gissell@tpwd.state.tx.us.

TRD-200601296
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: March 1, 2006

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Mineral Lease

Oil and Gas Nomination, Sheldon Lake State Park and Environmental Learning Center, Harris County

In a meeting on April 6, 2006, the Texas Parks and Wildlife Commission (the Commission) will consider a proposal that a recommendation be forwarded to the Board for Lease at the General Land Office to nominate 54.47 acres at Sheldon Lake State Park and Environmental Learning Center in Harris County for oil and gas lease. The oil and gas on this site is owned by TPWD. Funds generated from the lease activity will be deposited in the appropriate TPWD fund. The proposed recommendation to the Board for Lease will request that no surface occupancy be allowed on the property. Before taking action on this matter, the Commission will take public comment regarding the proposed transactions. Prior to the date of the meeting, public comment may be submitted to Corky Kuhlman, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlman@tpwd.state.tx.us.

TRD-200601297
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: March 1, 2006

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Proposed Land Transfer

47 Acres at Lake Brownwood State Park

In a meeting on April 6, 2006, the Texas Parks and Wildlife Commission (the Commission) will consider the proposed transfer of approximately 47 acres to the Brown County Water Improvement District. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. In January 2006, the Commission was briefed by Texas Parks and Wildlife Department staff regarding the proposed transfer and staff was authorized to proceed with obtaining public input. On March 7, 2006, a public hearing is being held in Brown County regarding the proposed transfer. The 47 acres is included in property that has been used as a camp by the Girl Scouts-Heart of Texas Council since on or about 1954. If the transfer is approved, it is anticipated that the Brown County Water Improvement District will enter a long-term lease with the Girl Scouts for continued use of this property. Before taking action, the Commission will take public comment regarding the proposed transfer. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email to ted.hollingsworth@tpwd.state.tx.us.

TRD-200601295
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: March 1, 2006

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Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on February 21, 2006, for a state-issued certificate of franchise authority (CFA), pursuant to Public Utility Regulatory Act (PURA) §§66.001 - 66.016. A summary of the application follows.

Project Title and Number: Application of Friendship Cable of Texas, Incorporated, doing business as Cebridge Connections, for a State-Issued Certificate of Franchise Authority, Project Number 32435 before the Public Utility Commission of Texas.

Applicant intends to provide cable service. The requested CFA service area footprint the municipal boundaries of the municipalities as shown on Exhibit A to the application.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 32435.

TRD-200600998
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2006

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Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On February 22, 2006, TelePacific Communications filed an application with the Public Utility Commission of Texas (Commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60329. Applicant intends to relinquish its certificate.

The Application: Application of TelePacific Communications to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 32440.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 15, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32440.

TRD-200600999
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2006

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Notice of Application for Service Area Exception in Bell County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 21, 2006, for a Certificate of Convenience and Necessity for service area exception within Bell County, Texas.

Docket Style and Number: Application of TXU Electric Delivery Company (TXU) for a Certificate of Convenience and Necessity for Service Area Exception within Bell County. Docket Number 32439.

The Application: Elm Creek Water Supply has requested electric service to a single point of service to serve a 65 hp pumping unit motor. The proposed site is located in the singly certificated area of TXU and the nearest TXU electric facilities are located approximately three miles to the South. McLennan County Electric Cooperative, Inc (McLennan) presently operates existing electric facilities less than 1/2 mile from the location. TXU proposes a service area exception to allow for McLennan to serve the proposed Elm Creek load. Both applicants are in agreement and support the application.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than March 20, 2006, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 32439.

TRD-200600965
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 23, 2006

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on February 22, 2006, for a service provider certificate of operating authority (SPCOA), pursuant to Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of Hamilton Telephone Company, doing business as Hamilton Telecommunications, for a Service Provider Certificate of Operating Authority, Docket Number 32444 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, long distance, and relay services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 15, 2006. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 32444.

TRD-200601000
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2006

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Notice of Application to Amend Certificated Service Area Boundaries in Cameron County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 24, 2006, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend Electric Utility Certificated Service Area Boundaries within Cameron County (Rancho Simpatico Subdivision). Docket Number 32451.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Paula Sladek LeGros, requesting BPUB to provide electric utility service to a proposed subdivision. The property encompasses 166.09 acres of land. The estimated cost to BPUB to provide service to this proposed area is $586,765.60. The area is presently undeveloped. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than March 20, 2006, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 32451.

TRD-200601176
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 28, 2006

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Notice of Application to Amend Certificated Service Area Boundaries in Kimble County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 17, 2006, for an amendment to certificated service area boundaries within Kimble County, Texas.

Docket Style and Number: Application of Central Texas Electric Cooperative, Inc. (CTEC) for Amendment to Certificate of Convenience and Necessity for Service Area Exception within Kimble County. Docket Number 32428.

The Application: A landowner has requested service to an undeveloped area of land located within a service area certificated to Pedernales Electric Cooperative, Inc. (PEC). CTEC currently serves other loads on the property and CTEC's existing facilities are closer to the location at which the customer desires service. PEC proposes to transfer the subject area to CTEC and relinquish the right or obligation to provide delivery service within the subject area. Both applicants are in agreement and support the application.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than March 17, 2006 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 32428.

TRD-200600964
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 23, 2006

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on February 23, 2006, with the Public Utility Commission of Texas (Commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on March 3, 2006.

Docket Title and Number: Application of Sugar Land Telephone Company for Approval of LRIC Study for New Residential Custom Calling Package, the Essential Package Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 32445.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 32445. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 32445.

TRD-200601002
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2006

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on February 23, 2006, with the Public Utility Commission of Texas (Commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on March 3, 2006.

Docket Title and Number: Application of Texas ALLTEL, Incorporated for Approval of LRIC Study for New Residential Custom Calling Package, the Essential Package Pursuant to P.U.C. Substantive Rule §26.214, Docket Number 32446.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 32446. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 32446.

TRD-200601003

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 24, 2006

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Notice of Petition for Approval of the ERCOT Compliance Process

Application: On January 31, 2006, the Electric Reliability Council of Texas, Inc. (ERCOT) filed with the Public Utility Commission of Texas a petition for approval of the ERCOT compliance process. Pursuant to P.U.C. Substantive Rule §25.503(j), ERCOT is required to develop and submit for commission approval a process to monitor material occurrences of non- compliance with ERCOT procedures, including occurrences that have the potential to impede ERCOT operations or represent a risk to system reliability.

Docket Style and Number: Petition of the Electric Reliability Council of Texas for Approval of the ERCOT Compliance Process, Docket Number 32350.

Notice: ERCOT has sent notice of this petition to all Qualified Scheduling Entities and Resource Entities registered with ERCOT and has posted notice of this petition on its website. ERCOT filed proof of publication on February 2, 2006.

Persons wishing to intervene in this proceeding shall do so no later than Friday, March 24, 2006. A technical conference will be held on Tuesday, March 28, 2006, at 10:00 a.m. in the Commissioners' Hearing Room at the commission's offices, 1701 N. Congress Avenue, Austin, Texas 78701. The purpose of the technical conference is to allow interested parties to ask clarifying questions and to provide comments on the compliance process. The deadline for initial written comments on ERCOT's petition is Friday, April 7, 2006, and replies to those comments are due on Friday, April 21, 2006. Persons may contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 32350.

TRD-200601170
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 28, 2006

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Notice of Workshop on Entergy Gulf State Inc.'s Plan for Identifying an Applicable Power Region

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding Entergy Gulf State Inc.'s plan for identifying a power region on Wednesday, March 29, 2006, at 10:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 32217, *Entergy Gulf State Inc.'s Plan for Identifying an Applicable Power Region Pursuant to PURA §39.452(f)*, has been established for this proceeding.

Ten days prior to the workshop, the commission shall make available in Central Records, under Project Number 32217, an agenda for the format of the workshop.

Questions concerning the workshop or this notice should be referred to Adrianne G. Brandt, Senior Retail Market Analyst, Electric Industry Oversight, (512) 936-7384. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200601168
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 28, 2006

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Texas Racing Commission

Notice of Public Hearing

Pursuant to Texas Civil Statutes, Article 179e, §6.06, an administrative law judge from the State Office of Administrative Hearings will conduct an administrative hearing for the Texas Racing Commission in SOAH Docket No. 476-04-5361, in the *Matter of an Application for a Class 2 Horse Racetrack License in Webb County, Texas.* The hearing is currently set to begin at 9 a.m. on Monday, March 27, 2006, at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. However, this location is subject to change. If there is a change of location, an amended notice with the new location will also be published in the *Texas Register.* All interested persons are welcome to attend.

The applicants, Laredo Race Park, LLC and LRP Group, Ltd., assert that they are both qualified to receive a Class 2 horse racetrack license.

The hearing will be conducted in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, State Office of Administrative Hearings Rules of Procedure, 1 Texas Administrative Code Chapter 155, and the Texas Racing Commission Rules, 16 Texas Administrative Code Chapter 307.

Questions regarding this matter should be directed to Charla Ann King, Executive Secretary, Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711, (512) 833-6699, fax (512) 833-6907.

TRD-200601184
Elizabeth G. Goins
General Counsel
Texas Racing Commission
Filed: March 1, 2006

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Stephen F. Austin State University

Notice of Consultant Contract Availability

Stephen F. Austin State University (the University) invites proposals from fundraising consultants and firms to conduct a fundraising feasibility study for a comprehensive campaign. Established in 1923, the University consists of six academic colleges and a strong student activities division including intercollegiate athletics. There are several auxiliary organizations (SFASU Foundation, SFA Alumni Foundation, SFA Real Estate Foundation, SFA Alumni Association) existing to support the University by raising money and stewarding relationships.

The mission of the University is to provide students a foundation for success, a passion for learning and a commitment to responsible global citizenship in a community dedicated to teaching, research, creativity, and service. The governing body of the University is the Board of Regents consisting of nine members. The Board of Regents set an aggressive fundraising agenda for capital projects and endowments making

the prospective goal of a comprehensive campaign range between $80 - $100 million.

REQUIRED SERVICES: The consultant will be required to provide the following services: 1. An assessment of the perception of the University's strengths, weaknesses, and distinctive contributions to the region, state and community; 2. A determination of the University's readiness to conduct a major fundraising campaign and its capacity to manage the organizational impact of such a campaign. This will include an analysis of the University's ability to raise the amount needed (estimated at $80 - $100 million) to achieve its planning objectives; 3. An identification of significant opportunities, potential volunteers, sources of support, prospective donors, and strategies to position the University as a potential major recipient of funding support. This will include the development of a list of prospective lead and advance gift donors and identification of their preferred types of donor recognition; 4. Assistance in formulating the University's case statement; 5. Identification of prospective campaign leadership and key volunteers for a successful campaign; 6. An overall campaign strategy and timeline including a proposed "rollout" of regional schedule of campaign activities and a campaign budget including professional consulting fees; 7. An assessment of obstacles and important issues including the possible strategies for addressing them; 8. Recommended strategies for on-going consultation that would maximize the fundraising potential of the University's campaign.

The selected consultant will prepare a written report which summarizes the study results and will be prepared to present the findings orally. A draft of this report will be reviewed in detail with the University administration to ensure that it addresses all elements of the required services prior to finalization of the report. The consultant will also be prepared to present in person the findings at a scheduled meeting of the University Boards of Regents.

PROPOSAL FORMAT: The following components are required for completion of a response to this Request for Proposals: 1. Statement of Firm History and Qualifications - Provide a summary of the firm and describe the overall strength of the company. Include location of corporate headquarters and any regional offices, depth of professional and support staff, number of years in business, ownership structure, and primary contact person. Provide also a full list of consulting services offered by the firm; 2. Resume of proposed Project Leader - Provide a resume of the individual proposed as the primary contact person and Project Leader for this study and possible follow-up services. The Project Leader may not be changed without the prior approval of the University. The resume should include at a minimum the number of years of experience with fundraising campaigns, and the references (contact name and phone number) with whom the individual has worked on similar studies within the past 5 years; 3. Methodology - Describe the methodology proposed for the study, including acceptable sample sizes and response rates as well as a schedule of completion dates for the study; 4. Itemization of Deliverables - The deliverables will include the preliminary draft report, a final written report, informal discussions with key personnel, and oral reports to the University administration and Board of Regents. The final written report will include a prospective list of major gift donors and a list of funding priorities that have garnered interest among the prospects; 5. References - Provide references from at least five clients comparable to the University that represent successful completed campaigns; 6. Fee Structure - Detail the proposed fee structure for completion of the required services.

Respondents should submit one unbound fully executed original, clearly marked on the cover, and five copies of the proposal.

PROPOSAL DEADLINE: Proposals must be received no later than 5:00 p.m. March 31, 2006. Proposals may be delivered as follows: By hand to Jerry E. Holbert, Ph.D., CFRE, Vice President for University Advancement, Stephen F. Austin State University, Suite 303 Austin Building, Vista Drive, Nacogdoches, Texas; By mail to P. O. Box 6092, SFA Station, Nacogdoches, Texas 75962; Electronically to jholbert@sfasu.edu.

SELECTION CRITERIA: The firm or individual selected to perform this project will be chosen on the basis of competitive proposals received in response to this request for proposals. The selection of the winning proposal is expected by April 15, 2006. Selected candidates will be invited to interview with the University administration and representatives of the Board of Regents April 12 or 13, 2006. Details regarding the date and location for the interviews are to be determined later. Candidates invited to make presentations will be notified by telephone.

COMMENCEMENT OF SERVICES: Commencement of services is expected to be May 1, 2006. The period of service for the contract is expected to be May 1, 2006 - October 1, 2006.

Please contact Dr. Holbert at (936) 468-5406 for further information.

TRD-200601091
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: February 28, 2006

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of San Antonio, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: The City of San Antonio, Stinson Municipal Airport. TxDOT CSJ No. 0615STSON. Scope: Provide engineering/design services to rehabilitate Taxiway A; extend Runway 9-27, Taxiway D-2 and parallel Taxiway D to Runway 27; overlay Runway 9-27; construct run-up pad at Runway 32 and elevated helipad; replace MIRL system on Runway 9-27, replace MITL System on Taxiway A; install REILS at Runway 9 and 14; install PAPI-4 at Runways 9 & 27 and 14 & 32; clear obstructions Runway 14 & 32; mark Runway 9-27; and erosion and sedimentation controls at the Stinson Municipal Airport.

The **DBE** goal is set at **7%**. TxDOT Project Manager is Harry Lorton, P.E.

To assist in your proposal preparation, the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Stinson".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be e-mailed by request or downloaded from the TxDOT web site, URL address **http://www.dot.state.tx.us/avn/avn550.doc**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal for-

mat consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT. ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is an MS Word Template.

Five completed, unfolded copies of Form AVN-550 must be postmarked by U. S. Mail by midnight March 30, 2006. Mailing address: TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. on March 31, 2006. Overnight address: TxDOT Aviation Division, 200 E. Riverside Drive, Austin, Texas 78704. Hand delivery must be received by 4:00 p.m. March 31, 2006. Hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by e-mail will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The Consultant Selection Committee (committee) will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at **www.dot.state.tx.us/business/avnconsultinfo.htm**. All firms will be notified, and the top rated firm will be contacted to begin fee negotiations. The committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following the interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Harry Lorton, P.E., Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-200601221
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: March 1, 2006

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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